

1040

9444
In 8/13
AL 1/27
pt. 4

44
In 8/13
AL 1/27/PT. 4

AMENDMENTS TO ALASKA NATIVE CLAIMS
SETTLEMENT ACT
PART 4

GOVERNMENT
Storage

DOCUMENTS
JUL 26 1976

THE LIBRARY
KANSAS STATE UNIVERSITY

HEARING
BEFORE THE
COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
UNITED STATES SENATE
NINETY-FOURTH CONGRESS

SECOND SESSION

ON

SUNDRY BILLS AMENDING OR RELATING TO THE ALASKA
NATIVE CLAIMS SETTLEMENT ACT (P.L. 92-203)

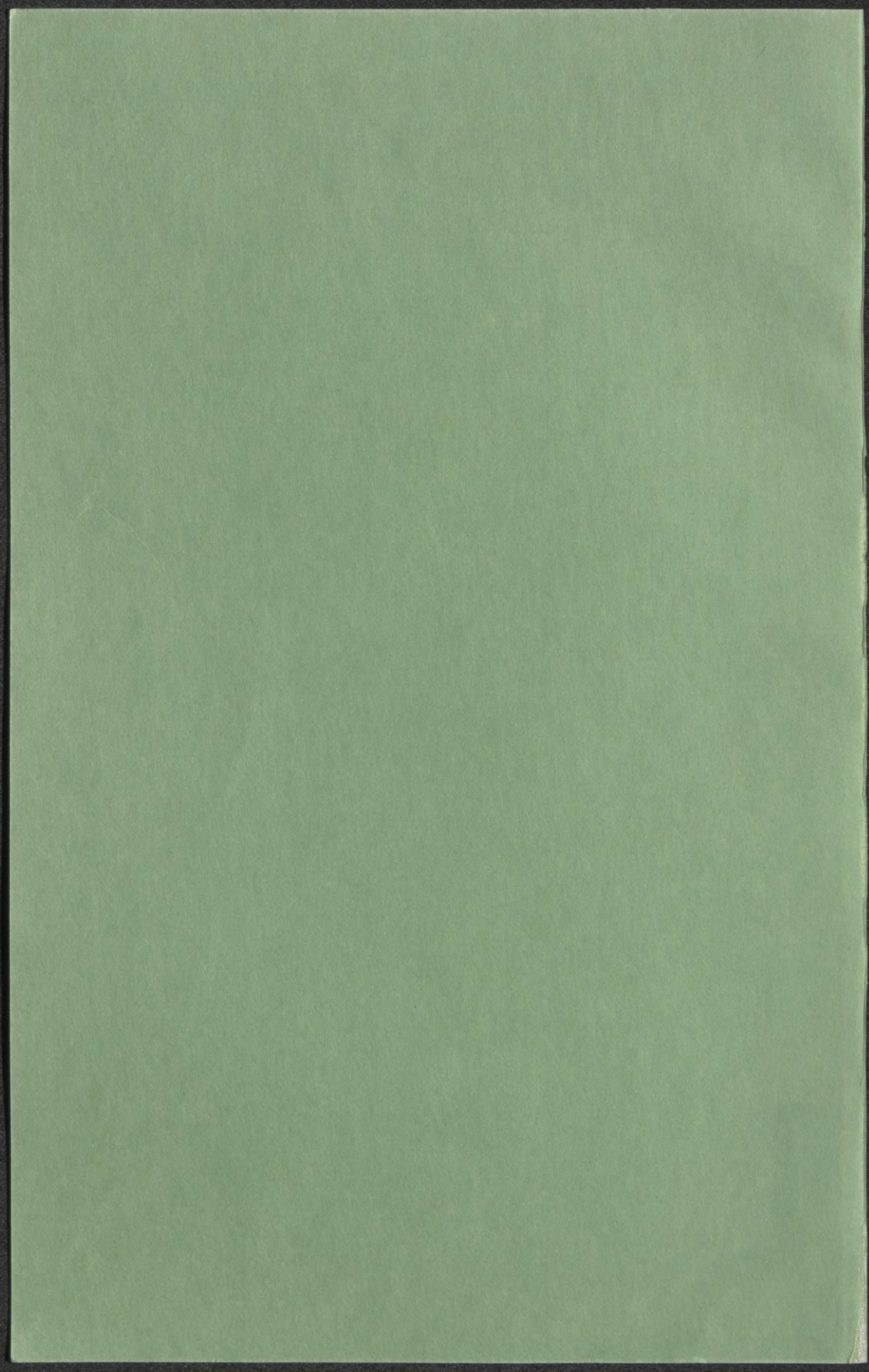
MAY 16, 1975

ADDITIONAL CORRESPONDENCE SUBSEQUENT TO THE
HEARING OF MAY 16, 1975, CONCERNING *EDWARDSEN* v.
MORTON (369 F. SUPP. 1359 (1973))



Printed for the use of the
Committee on Interior and Insular Affairs

KSU LIBRARIES
A11900 824787



AMENDMENTS TO ALASKA NATIVE CLAIMS
SETTLEMENT ACT
PART 4

HEARING
BEFORE THE
COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
UNITED STATES SENATE
NINETY-FOURTH CONGRESS

SECOND SESSION

ON

SUNDRY BILLS AMENDING OR RELATING TO THE ALASKA
NATIVE CLAIMS SETTLEMENT ACT (P.L. 92-203)

MAY 16, 1975

ADDITIONAL CORRESPONDENCE SUBSEQUENT TO THE
HEARING OF MAY 16, 1975, CONCERNING *EDWARDSSEN* v.
MORTON (369 F. SUPP. 1359 (1973))



Printed for the use of the
Committee on Interior and Insular Affairs

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1976

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

HENRY M. JACKSON, Washington, *Chairman*

FRANK CHURCH, Idaho

LEE METCALF, Montana

J. BENNETT JOHNSTON, Louisiana

JAMES ABOUREZK, South Dakota

FLOYD K. HASKELL, Colorado

JOHN GLENN, Ohio

RICHARD STONE, Florida

DALE BUMPERS, Arkansas

PAUL J. FANNIN, Arizona

CLIFFORD P. HANSEN, Wyoming

MARK O. HATFIELD, Oregon

JAMES A. McCLURE, Idaho

DEWEY F. BARTLETT, Oklahoma

GRENVILLE GARSIDE, *Special Counsel and Staff Director*

DANIEL A. DREYFUS, *Deputy Staff Director for Legislation*

WILLIAM J. VAN NESS, *Chief Counsel*

D. MICHAEL HARVEY, *Deputy Chief Counsel*

STEVEN P. QUARLES, *Counsel*

HARRISON LOESCH, *Minority Counsel*

(II)

MEMORANDUM OF THE CHAIRMAN

To Members of the Senate Committee on Interior and Insular Affairs:

On June 3, 1975, I requested several parties concerned with issues which they perceive to be raised by the decision of *Edwardsen v. Morton* (369 F Supp. 1359 (1973)) to answer a series of questions regarding, among other things, potential legislative action to resolve those issues. The responses were published as a committee print this past summer (Amendments to Alaska Native Claims Settlement Act, Part 2). I explained in my introductory memorandum to that volume that further information was being sought from the Department of the Interior and the Justice Department and would be published when received. Accordingly, the additional inquiries to those two Departments and their respective responses are printed in full as part A.

On September 12, 1975, after the responses to my June 3 letter had been compiled and analyzed by the committee staff, I asked the following parties to provide additional information for the committee's use: counsel for the plaintiffs in *Edwardsen*; the State of Alaska; the Congressional Research Service; the Department of Justice; the Department of the Interior; the Alaska Federation of Natives; and four oil companies publically identified as potential defendants in any further judicial proceedings under the *Edwardsen* holding (Exxon Company, U.S.A.; Atlantic Richfield Company; Standard Oil of Ohio; and BP Alaska, Inc.).

Explaining the history of committee action on this issue, I requested each to react and comment on the following legislative alternatives that had been proposed up to that date:

1. No action whatsoever by the Congress.
2. Retroactive expression of congressional intent in appropriate legislative form.
3. Congressional action to establish a procedure for, and to mandate expedited judicial review of, the opinion of the court in the *Edwardsen* case.
4. Creation of an administrative entity, similar to the Pueblo Indian Lands Board, to resolve the Native claims involved.
5. Legislative abolition of third-party claims for indemnification against the State of Alaska and the Federal Government.
6. A complete legislative settlement of the Native claims, similar in nature to the original Settlement Act.

The September 12, letter and the responses are set out in full in part B.

HENRY M. JACKSON, *Chairman.*

CONTENTS

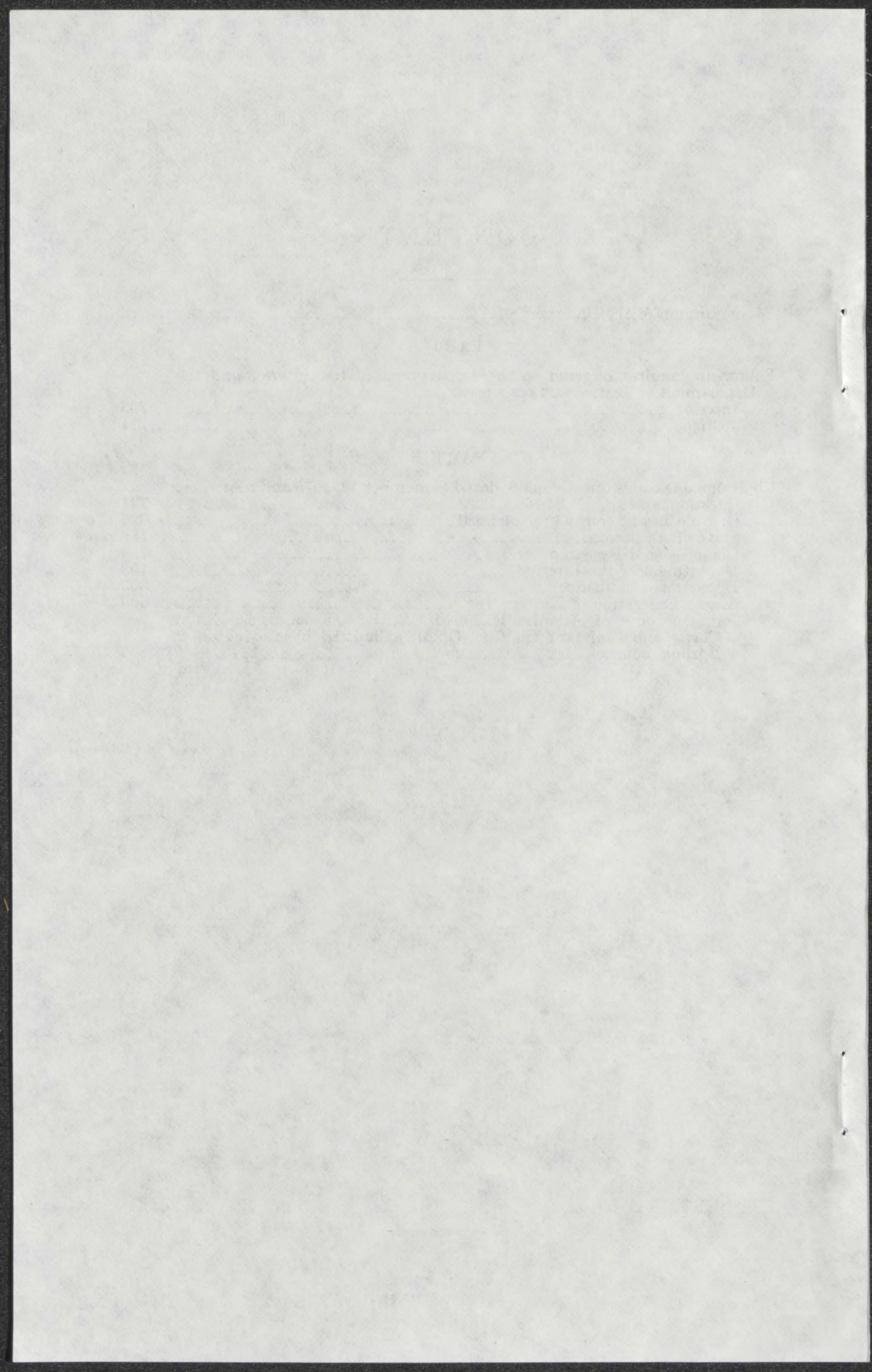
Memorandum of the Chairman.....	Page III
---------------------------------	-------------

PART A

Follow-up inquires directed to the Department of the Interior and the Department of Justice and responses:	
Interior.....	703
Justice.....	711

PART B

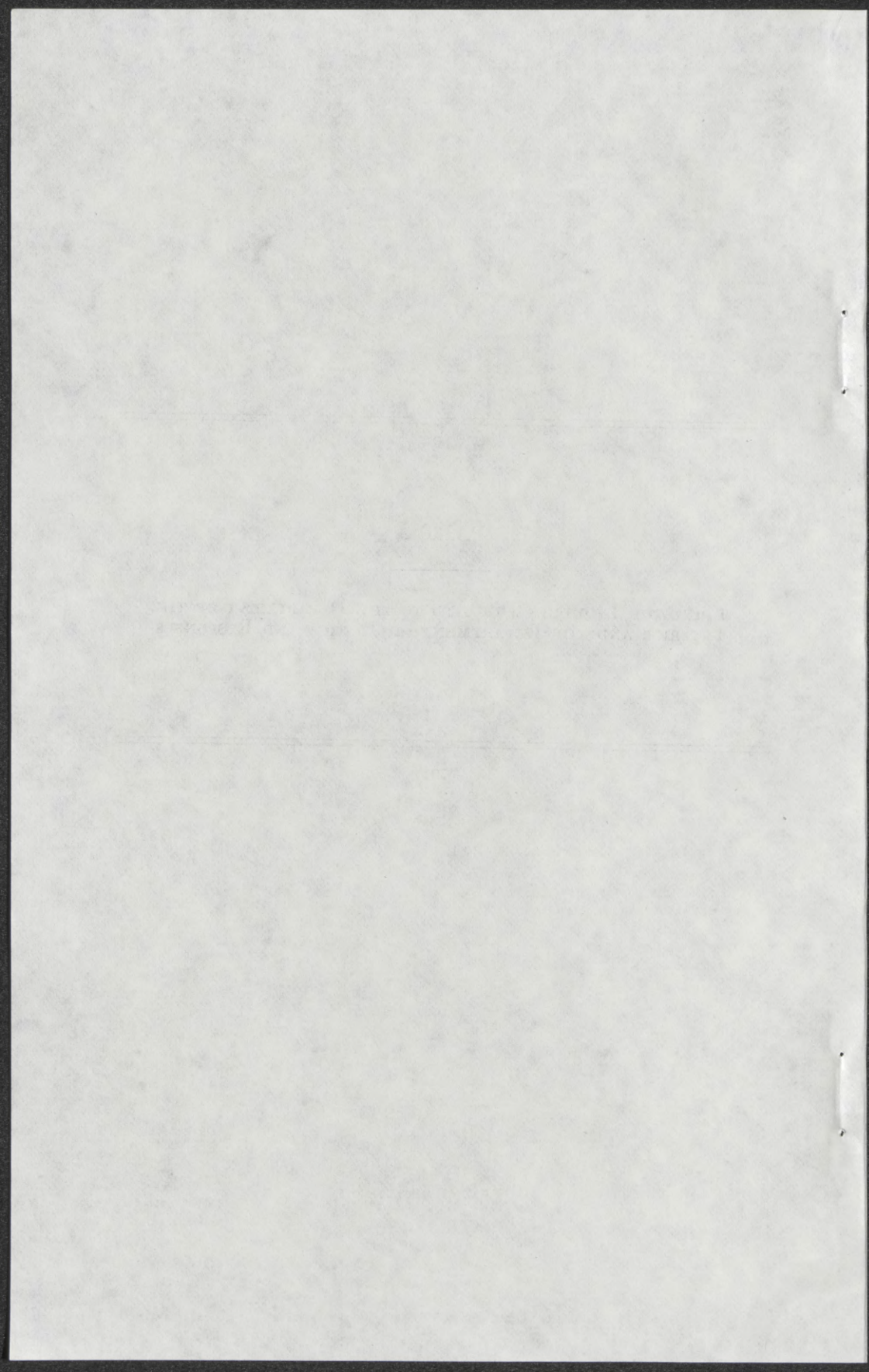
Chairman Jackson's questionnaire dated September 12, 1975 and responses:	
Questionnaire.....	721
O. Yale Lewis, counsel for plaintiff.....	722
State of Alaska.....	786
Congressional Research Service.....	793
Department of the Interior.....	798
Department of Justice.....	800
Alaska Federation of Natives, Inc.....	800
Joint response of Atlantic Richfield Co., BP Alaska, Inc., Exxon Corp., and Standard Oil Co. (Ohio), submitted by Covington & Burling, counsel.....	803



PART A

FOLLOWUP INQUIRIES DIRECTED TO THE DEPARTMENT OF THE
INTERIOR AND THE DEPARTMENT OF JUSTICE AND RESPONSES

(701)



AUGUST 5, 1975.

Hon. KENT FRIZZELL,
Acting Secretary, Department of the Interior, Washington, D.C.

DEAR MR. FRIZZELL: This is in reply to the June 30 letter of Assistant Secretary Hughes responding to questions I had raised concerning the *Edwardsen* case.

If the Department of the Interior is to be of assistance to the Committee in analyzing the issues raised by the *Edwardsen* decision, it is essential that the Department provide the Committee with more expansive and detailed information than that submitted in the letter of June 30.

Accordingly, I am enclosing additional questions for the Department's response, some of which directly refer to the letter of Assistant Secretary Hughes and some of which are elaborations of those posed in my original letter. I would appreciate receiving your response by August 15.

Also enclosed for your information are copies of the letters I have received from other parties in response to my June 3 letter.

I. ELABORATION OF ORIGINAL QUESTIONS

A. Question One

1. Has the Department completed its investigation of trespass claims on the Arctic Slope pursuant to the *Edwardsen* stipulation?

(a) How many claims were investigated?

(b) Of the nine types of damages specified in the *Edwardsen* stipulation, what is the approximate number of claims investigated in each category?

2. What is the approximate number of claims that the Department expects to recommend for litigation by the Justice Department? Please provide the approximate number to be recommended in each category outlined in the *Edwardsen* stipulation.

B. Question Two

1. Of the approximate number of defendants, how many are natural persons as opposed to corporations or governmental entities?

2. Does the Department expect the United States Government or any of its agencies to be a defendant either for breach of its fiduciary duty or for breach of the "fair and honorable dealings" clause of 25 U.S.C. 70a? Please elaborate.

C. Question Three

The Committee is not interested in knowing the specific measure of damages that the Department might "urge on a court" in an actual case against a specific individual. However, the Committee sincerely desires the views of the Department with respect to the measure of damages that could be assessed against potential defendants. Therefore, the Committee requests the Department's analysis of the measure of damages that could be utilized by a court for each type of trespass

damage specified in the *Edwardsen* stipulation—including the measure of damages that *could* be assessed against the United States or any of its agencies.

D. Question Four

The Committee assumes that the Department, given its unique working knowledge of the social and economic structure of the State of Alaska and its involvement in and familiarity with the *Edwardsen* case, is in an excellent position to provide the information sought by question 4. The Committee would appreciate the Department's observations and opinions. I sincerely request that they be provided.

E. Questions Five, Six and Seven

Should the Committee ultimately decide that the issues raised by *Edwardsen* warrant a response and that the Congress is the appropriate forum to make that response, the form of that response would be legislation. Therefore, questions 5 through 7, concerning possible legislative efforts and their effects, were the most important of the questions I posed in my June 3 letter. As can be readily determined from a reading of the responses of the other parties, there are serious disagreements concerning the appropriateness, efficacy, and impacts of various, possible legislative actions.

The Committee has equal access to the opinion of the Court, as well as to the pleadings and briefs, filed in the *Edwardsen* case and I do not feel that extensive quotations from them are particularly useful to the Committee's deliberations.

However, I do believe that the Committee would benefit greatly from, and hereby request that you supply us with, the Department's opinion on the advisability of Section 15 of S. 1824, including analysis of any relevant constitutional difficulties the section might present. Most important, please provide the Department's suggestions of legislative alternatives to Section 15.

II. IMPACT OF EDWARDSSEN IN AREAS OTHER THAN THE ARCTIC SLOPE

A. It is stated on page 5 of the Department's response that the "impact of *Edwardsen* is not necessarily limited to the North Slope" since Judge Gasch's "rationale might be applicable to claims of other Natives in other regions".

1. Does the Department of the Interior hold the view that "exclusive" use and occupancy must be demonstrated before a claim for trespass could be maintained under the holding of *Edwardsen*? Please set forth an explanation of your interpretation.

2. Does the Department believe that such "exclusive" use and occupancy can be established by Natives in regions other than the Arctic Slope? If so, specify the areas. If not, explain why.

3. Would the types of trespass claims in the areas, if any, specified in question 2 differ significantly from the types of claims that the Department of the Interior has investigated on the Arctic Slope? If so, please specify the nature of the claims and the manner in which they differ.

B. On page 5 of the Department's response it is stated that the Department of the Interior has received only "informal expressions of interests from other regional corporations so far" and that no other Native group has identified any other "usable claims".

1. What was the substance of the "informal expressions of interest? From whom and from what areas of the state have they been received?

2. Hypothetically, if a Regional Corporation or individual Native or Natives requested the Department to investigate trespass claims in areas *other than* the Arctic Slope:

(a) Would the Department conduct such an investigation?

(b) If the answer to (a) is affirmative, please explain whether such action would be undertaken as a consequence of the *Edwardsen* opinion, the *Edwardsen* stipulation, or some other judicial or statutory mandate.

3. What does the Department define as a "usable" claim?

III. EDWARDSSEN STIPULATION AND AGREEMENT

A. Page 5 of the Department's response contains an explanation of why it entered into the stipulation and agreement with the plaintiffs. Your explanation makes no reference to the plaintiffs' motion for a mandatory injunction against the Secretary, filed on October 25, 1973, which, apparently, sought the relief that the Department agreed to take under the stipulation. Would you please provide the Committee with a more detailed explanation?

B. On page 4 of the Department's response, it is noted that the plaintiffs and the Department have deferred for "further discussion" damages caused by extraction of sand and gravel authorized by the Department of the Interior and damages caused by the use of any of the Arctic Slope lands or resources for any federal purpose by any agency of the United States Government.

1. Have such "further discussions" taken place? If so;

(a) Have any further agreements or understandings been reached with respect to the specified issues? If so, please describe them.

(b) What is the opinion of the Department regarding the likelihood of the United States Government being sued for the types of damages specified in paragraphs 12-a and 12-b of the *Edwardsen* stipulation and agreement? Do you anticipate such suits, if any, to be brought by the federal government on behalf of the Natives?

2. If the discussions have not yet taken place, when does the Department expect them to occur?

IV. POTENTIAL CONFLICTS OF INTEREST

Future judicial proceedings in *Edwardsen* and any subsequent litigation deriving from *Edwardsen* have the propensity to offer serious "conflict of interest" problems for both the Department of the Interior and the Department of Justice. As you know, over the last three years this Committee has been considering various long-term solutions to the conflict of interest problem. In that light, I am disappointed in the failure of the Administration to resubmit promptly to this Congress its Indian Trust Counsel proposal or consider any modification in its proposal to make it more acceptable to the wishes of the Indian community. I am particularly concerned, however, with the instant conflict of interest problem. Could you please set forth in as much detail as possible what procedures, usual or special, your Department plans to adopt to minimize or eliminate conflict of interest possibilities in any subsequent judicial proceeding related to *Edwardsen*?

Sincerely yours,

HENRY M. JACKSON,
Chairman.

U.S. DEPARTMENT OF THE INTERIOR,

OFFICE OF THE SOLICITOR,

Washington, D.C., September 3, 1975.

HON. HENRY JACKSON,
U.S. Senate
Washington, D.C.

DEAR SENATOR JACKSON: This letter is in partial reply to yours of August 5 concerning *Edwardsen v. Morton* and section 15 of S. 1824. At the outset, we would like to assure you that the Interior Department wishes to provide as much assistance as possible to the Committee's analysis of the issues raised by the *Edwardsen* decision. However, we also trust the Committee will understand that we cannot answer all your questions completely. First, as our June 30 letter said, we are in the process of recommending hundreds of claims to the Justice Department; in short, we are in the middle of preparing major litigation. We believe that we cannot respond completely to a few of your questions without substantially prejudicing our ability—and that of the Justice Department—to effectively prosecute that litigation on behalf of Alaskan Natives. Second, some of your questions call for judgments we do not have the expertise to make, for information we do not have or cannot assemble into useful form without a major, lengthy study, or for legal analysis that is peculiarly within the institutional competence of the Justice Department.

Finally, a few of your questions call for information that will be available only after we have completed the processes of making litigation recommendations to Justice. It is essential that these recommendations be delivered to Justice as soon as possible, inasmuch as if certain complaints are not filed shortly, the potential defendants might be able to raise a defense based on the statute of limitations. Of necessity, lawyers that are working on those recommendations are also the lawyers that would have to develop many of the answers to your questions. For that reason, the Solicitor's Office has had to give priority to the litigation recommendations, and we will be unable to answer a few of your questions until sometime in the early fall. We will respond further to these questions as soon as we have the additional information you request.

We have tried to respond as completely as possible to your questions. Where one of the foregoing reasons prevents us from providing a complete response, we have noted that reason in our response.

PART I—ELABORATION TO JUNE 30 LETTER

Question 1. 1. (a) We have not completed our investigation of all the trespass claims. To date, approximately 500 separate entries by non-Natives onto Artic Slope lands have been identified. Many of these entries appear to have resulted in more than one of the types of damages listed in the stipulation. Although all these entries have already been investigated in varying degrees, we expect that we will need to conduct some investigations until shortly before trials commence. With respect to many of these entries, additional necessary evidence is peculiarly within the possession or knowledge of the potential defendants and can be obtained only by discovery after complaints have been filed.

(b) At this time we are unable to provide an accurate breakdown of these entries by categories enumerated in the stipulation. The stipulation, of course, speaks in terms of trespasses that caused enumerated types of damage. However, for our purposes in working up specific litigation recommendations, we have organized our material and files by type of entry (e.g. seismic survey, road constructions, mineral removal) rather than by type of damage caused by a particular entry (e.g. damage to wildlife migration patterns or water resources, damages for obtaining mineral data).

At present, therefore, we are not readily able to compile an answer to your request for the number of claims falling in each damage category. However, we are now placing all our information about the 500 entries into a computer. When that is completed, we will be able to get a printout by damage category, and we will then provide the Committee with the requested information.

In the interim, the following is a rough approximation of the percentage of entries in each category of entry:

	Percent
Roads.....	10
Airstrips.....	10
Drill Sites.....	20
Gravel/Sand.....	5
Geologic/Geophysical.....	40
Campsites.....	10
Miscellaneous.....	5

A rough approximation of the percentage of damage claims (by number of claims rather than value of claims) falling in each category of damage listed in the stipulation is as follows:

	Percent
Graveyards and consecrated areas.....	1
Sand and gravel removal.....	9
Damage to water supplies.....	15
Disturbance to game patterns.....	14
Damages to physical properties.....	5
Killing of game.....	10
Acquisition of mineral information.....	30
Extraction of oil and gas.....	5
Utilization of surface.....	25

2. Because we are still working up our litigation recommendations, we are unable to give any approximation of the total number of claims we expect to recommend to the Justice Department. We will respond further as soon as we can do so. We have, however, made an initial recommendation of 100 claims, which are divided by category as follows:

	Percent
Roads.....	7
Airstrips.....	13
Drill Sites.....	28
Gravel/Sand.....	9
Geologic/Geophysical.....	37
Campsites.....	4
Miscellaneous.....	2

Question 2. 1. Only a few of the 175 possible defendants are natural persons; the vast majority are corporations. To date, the State of Alaska is the only governmental entity we have identified as a potential defendant.

2. With respect to litigation against the United States by Arctic Slope Natives for monetary damages, you no doubt are aware that the lawyers for the Arctic Slope Natives in the *Edwardsen* case have suggested that the Arctic Slope Eskimos may ultimately recover from the United States for failure to collect valid trespass claims. We have no knowledge as to whether such litigation will actually be instituted, but that is certainly a distinct possibility. We do not expect any litigation against the United States asserting breach of the "fair and honorable dealings" clause of 25 U.S.C. § 70a; we are not aware of any facts that would make that clause applicable to this situation.

Question 3. Because of the imminent litigation, we would prefer not to make any public judgments concerning measures of damages in such litigation; to do so might have a prejudicial effect on our ability to assert court arguments on this subject on behalf of Alaskan natives. Further, no final decisions as to the measure of damages we will urge have been made by us or the Justice Department, and any judgments we now expressed—even confined to "the measure of damages that could be assessed against potential defendants"—might prejudice our ability to urge something different from those judgments based on further research. Furthermore, it is impossible to comment on the measure of damages that "could" be assessed without implying that such measure was warranted in law and would, accordingly, be urged by us in litigation.

The matter of damages that might be assessed against the United States has several aspects. First, there is the question of the United States' liability for trespasses committed or authorized by an agency of the Government. Almost all—if not all—of the entries by the United States were for governmental, or sovereign, purposes (such as the D.E.W. line); we believe that the United States had the authority to make these entries and that they did not constitute trespasses. Only a small proportion of the entries by private parties were under Federal authorizations. These entries are subject to further discussion under the stipulation. Consequently, at present, we do not plan to recommend litigation of any claims where an agency of the Federal Government would be a defendant, and we do not see any exposure of the United States with regard to such claims. Even if the United States would have such exposure, we believe it would be relatively small.

Second, a defendant in litigation brought on our recommendation might counterclaim for indemnification against the United States. We do not believe such a counterclaim would be valid. If, however, the counterclaim were asserted and held valid, the judgment on the counterclaim could equal the amount of damages awarded the Natives.

The third aspect relates to any litigation the Natives might institute on the theory the United States breached its fiduciary duty to them. Presumably, such litigation would seek to recover from the United States the amount of damages the Natives believed the United States should have recovered from alleged trespassers.

Question 4. As we mentioned in our letter of June 30, the litigation we will be recommending will seek only monetary damages. We do not believe any monetary judgments we might obtain would have any effect on Federal planning or implementation of the Alaska Native Claims Settlement Act—subjects that are within our area of expertise.

We do not have any information or expertise on which to base any conclusions about the impact that such monetary judgments might have on the continued development of Alaskan energy resources, the economy or social structure of Alaska, or Alaskan long-range planning. These matters relate basically to the internal economic affairs of Alaska and the State's fiscal situation, subjects which are not within our province. The State of Alaska should be able to provide whatever additional information the Committee requires.

With regard to the subject of possible monetary judgments against the State, however, many of the entries by non-Natives purported to be pursuant to permits or other authorizations by the State of Alaska. We will recommend that the State of Alaska be joined as a co-defendant and joint tortfeasor in every case where the private defendant purported to act pursuant to an authorization of any type from the State. We will also recommend that the same damages be sought from the State as are sought from the other defendants. We cannot predict whether we will be successful against the State even if we obtain judgments against the private defendants. Thus, the impact of substantial monetary awards to the Natives, if we are successful in our litigation, may fall on the State as well private defendants (oil companies, contractors, geophysical companies, etc.). This means, of course, that the State may share in paying whatever damages are assessed—not that the total damages will increase.

Question 5. Section 15 presents the Congress with the issue of whether the *Edwardsen* decision correctly reflected the original intent of Congress when it enacted ANCSA. If, in the judgment of Congress, the *Edwardsen* decision does not reflect the original intent of Congress and section 15 does accurately reflect that intent, Congress has two choices. First, it might enact section 15. In this regard, we believe that what we understand to be the intent of section 15 would be effectively accomplished by the proposed language in section 15. We do not know of any different legislative approach that would better achieve that result. Second, notwithstanding a judgment that *Edwardsen* wrongly interpreted Congressional intent, Congress might not enact section 15 and instead leave the ultimate resolution of the issue to the Judicial Branch, either in a final decision in *Edwardsen* or a final decision in the litigation we will recommend on behalf of Natives (in which, undoubtedly, section 4 of ANCSA will be raised as a defense). At present, Interior is not able to make any specific recommendations as to whether section 15 should be adopted. The section 15 issue is now being reviewed, through the usual procedures, within the Administration, and until that is completed we cannot respond to your question about the advisability of that section.

Question 6. On June 19, the Justice Department advised you that, in their judgment, the approach of section 15 was constitutionally valid; we understand they will be reiterating that judgment to you shortly. Given the institutional competence of the Justice Department in Constitutional questions, we must defer to their judgments with respect to such matters.

We are not aware of any other difficulties related to legislative action on *Edwardsen*.

Question 7. Because we are not aware of any difficulties with section 15 and because we believe its language best accomplishes its intent, we have no suggestions to make as to alternative legislative approaches.

PART II—IMPACT OF EDWARDSSEN

A. 1. The term "exclusive use and occupancy", as used in Indian and Alaskan Native land claim matters, is a term of art found in many leading cases, such as *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). We are of the opinion that exclusive use and occupancy, in that sense, generally must be demonstrated as a basis for trespass claims of the type referred to in the *Edwardsen* stipulation. While Judge Gasch did not deal directly with the necessity of "exclusivity" as an element of aboriginal title, an exclusivity requirement can be inferred from his conclusion that aboriginal title includes a "guarantee of the occupants protection from intrusion". Therefore, aboriginal title such as we will assert in the Arctic Slope trespass cases will be based upon exclusive use and occupancy of the area by the Natives.

2. Native use and occupancy patterns south of the Brooks Range may differ in some respects from those on the North Slope in that: 1) many areas south of the Range were used by a number of distinct Native groups; and 2) many of the more southerly Natives did not travel as far as the Eskimos in their regular use of the lands. Nonetheless, we believe that "exclusive use and occupancy" vis-a-vis non-Natives at some time in the past can be established by Natives in regions other than the Arctic Slope; this is probably true even today with respect to a number of areas, including village sites, and such occupancy may well be exclusive even vis-a-vis other Native groups. Unfortunately, we do not have available the necessary information to provide the Committee with the data as to specific areas of exclusive use and occupancy, as you requested, other than the Field report, which we believe the Committee has.

3. As noted below, we have no information about specific trespass claims by Natives south of the Brooks range, and we are not conducting any investigations in this regard. Some Natives might contend that public land law entries were made, or mining claims were located, in areas of their exclusive use and occupancy and that these entries or locations constituted trespass. If such claims were made (and we have no knowledge whether such claims exist), they would differ from the North Slope claims; the latter do not involve entries under the public land laws or mining locations. We cannot answer your questions further because we have no information on which to base a response.

B. 1. Many of the "informal expressions" were received by a few of our lawyers in conversations with other lawyers representing non-Native interests in Alaska and were third-hand statements not received directly from Natives or persons representing Natives. Within the past six months, the Associate Solicitor for Indian Affairs has been informally advised by Mr. Edward Weinberg, who represents Koniag, Inc., and Mr. Robert Goldberg, who represents certain Natives of Chitina, that they may at some future time request the United States to bring some sort of trespass claim along the line of the *Edwardsen* claims.

2. If we were to conduct investigations in areas other than the North Slope, we would not do so pursuant to the *Edwardsen* stipulation; it applies only to the North Slope Natives and only to that case.

The support for such investigations would probably be the *Edwardsen* decision. We cannot answer whether we would conduct investigations, even on a hypothetical basis, for such would depend on who made the request and on the specific substance of the request.

3. Our June 30 letter contained a typographical error. The word "usable" should have been "suable". By "suable claim" we meant a claim containing at least some specifics, such as an indication of the location of the land involved, type of trespass involved, or nature of damage.

PART III—EDWARDSEN STIPULATION

A. We understand the Justice Department will provide the Committee with a further response to this question. Because the *Edwardsen* case is still pending, we believe we should not discuss the reasons for our decision further. The Committee should be aware, however, that what we agreed to in the stipulation is not everything sought by the motion for mandatory injunction.

B. The further discussions have not taken place, and we have no expectation as to when they will occur.

PART IV—CONFLICT OF INTEREST

We do not believe Interior has a conflict of interest at the present time. We assumed obligations under the stipulation, and we have been and are fully meeting those obligations. If situations should arise that present such a problem, we will develop appropriate procedures to deal with the specific problem.

We hope these answers will be of help to the Committee. We will supply additional information about the categories of claims we will recommend to Justice as soon as it is available.

Sincerely yours,

DAVID E. LINDGREN,
Deputy Solicitor.

HON. EDWARD H. LEVI,
Attorney General, Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: This is in reply to the June 19 letter of Assistant Attorney General Johnson responding to questions I had raised concerning the *Edwardsen* case.

If the Department of Justice is to be of assistance to the Committee in analyzing the issues raised by the *Edwardsen* decision, it is essential that the Department provide the Committee with more expansive and detailed information than that submitted in Mr. Johnson's letter.

Accordingly, I am enclosing additional questions for the Department's response, some of which directly refer to the letter of Assistant Attorney General Johnson and some of which are elaborations of those posed in my original letter. I would appreciate receiving your response by August 15.

Also enclosed for your information are copies of the letters I have received from other parties in response to my June 3 letter.

I. ELABORATION OF ORIGINAL QUESTIONS

A. *Question 1.* Approximately how long will it take the Department to conduct the examination of the formal report to be submitted by

the Department of the Interior, referred to on page 2 of Mr. Johnson's letter? After such an examination is completed, please estimate the time needed before trespass suits can be filed.

B. *Question 2.* What is the opinion of the Department on the likelihood of the United States Government or any of its agencies being sued for trespass or for breach of its fiduciary duty or for breach of the "fair and honorable dealings" clause of 25 U.S.C. 70a? Would the Department of Justice be involved in such suits, if any? If so, in what capacity?

C. *Question 3.* Please provide the Committee with the Department's analysis of the measure of damages that *could* be utilized by a court for each type of trespass damage specified in the *Edwardsen* stipulation—including the measure of damages that *could* be assessed against the United States or any of its agencies.

D. *Questions 5, 6 and 7.* Should the Committee ultimately decide that issues raised by *Edwardsen* warrant a response and that the Congress is the appropriate forum to make that response, the form of that response would be legislation. Therefore, questions 5 through 7 concerning possible legislative efforts and their effects were the most important of the questions I posed in my June 3 letter. As can be readily determined from a reading of the responses of the other parties, there are serious disagreements concerning the appropriateness, efficacy, and impacts of various, possible legislative actions.

The Committee has equal access to the opinion of the Court, as well as to the pleadings and briefs, filed in the *Edwardsen* case and I do not feel that extensive quotations from them are particularly useful to the Committee's deliberations.

However, I do believe that the Committee would benefit greatly from the opinion of the Department on the advisability of Section 15 of S. 1824, including analysis of any relevant constitutional difficulties it presents, and the Department's suggestions of legislative alternatives to Section 15. Such information would be most valuable to the Committee and I respectfully request that it be provided.

II. IMPACT OF EDWARDSSEN IN AREAS OTHER THAN THE ARCTIC SLOPE

A. Is it the opinion of the Department of Justice that the rationale of the *Edwardsen* case can be utilized as a basis for suits for trespass claims by Natives in regions other than the Arctic Slope? Please explain what facts must be demonstrated by potential Native plaintiffs before such suits could be maintained?

B. Hypothetically, if the Department of the Interior, after conducting an investigation of trespass claims in an area other than the Arctic Slope, were to recommend to the Department of Justice that litigation be instituted on behalf of individual Natives or a Native group by the United States:

1. Should the Department of Justice entertain such a recommendation, would the legal basis for so doing be the *Edwardsen* holding, the *Edwardsen* stipulation, or some other judicial or statutory mandate?

2. Should the Department of Justice fail to initiate such litigation, what would be the legal basis for so doing?

III. EDWARDSSEN STIPULATION AND AGREEMENT

It is not clear why the Department of Justice, on behalf of the Department of the Interior, entered into an agreement whereby the objective of the plaintiffs' motion for a mandatory injunction against the Secretary, filed on October 25, 1973, was apparently achieved. The Committee would be interested to learn what factors led to this decision and would appreciate the Department's explanation.

IV. FURTHER JUDICIAL ACTION REGARDING THE EDWARDSSEN HOLDING

Page 3 of the Department's response contains a reference to the fact that Judge Gasch's decision was not a "final judgment". With respect to this statement:

1. What judicial alternatives are available to the Department to modify or reverse the holding of Judge Gasch on the issue of alleged trespasses on the Arctic Slope? Please elaborate.
2. What judicial alternatives are available to the Department to modify or reverse the holding of Judge Gasch on the issue of trespass with respect to areas other than the Arctic Slope? Please elaborate.
3. What are the advantages and disadvantages of the above judicial alternatives as opposed to legislative action, in the form of Section 15 of S. 1824 or otherwise? Please elaborate.

V. POTENTIAL CONFLICTS OF INTEREST

Future judicial proceedings in *Edwardsen* and any subsequent litigation deriving from *Edwardsen* have the propensity to offer serious "conflict of interest" problems for both the Department of the Interior and the Department of Justice. As you know, over the last three years, this Committee has been considering various long-term solutions to the "conflict of interest" problem. In that light, I am disappointed in the failure of the Administration to resubmit promptly to this Congress its Indian Trust Counsel proposal or consider any modification in its proposal to make it more acceptable to the wishes of the Indian community. I am particularly concerned, however, with the instant conflict of interest problem. Could you please set forth in as much detail as possible what procedures, usual or special, your Department plans to adopt to minimize or eliminate conflict of interest possibilities in any subsequent judicial proceeding related to *Edwardsen*?

Sincerely yours,

HENRY M. JACKSON, *Chairman.*

DEPARTMENT OF JUSTICE,
Washington, D.C.

HON. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of August 5, 1975, to the Attorney General requesting answers to an Elaboration of the Original Questions contained in your letter of June 3 regarding a proposed

amendment to S. 1824 affecting the Alaska Native Claims Settlement Act, with particular reference to questions presented in *Edwardsen v. Morton*, 369 F. Supp. 1359 (D. D.C. 1973), has just been referred to me for reply.

This Department, as you know, is always desirous of assisting the Committee in matters affecting its responsibilities. In considering our answers to your original questions concerning this particular matter, it should be understood that the Land and Natural Resources Division does not originate investigations of claims on behalf of Indian tribes or Native groups but considers only recommendations for legal action submitted to it by the Department of the Interior which, of course, has administrative supervision over Indian affairs. Our answers, therefore, were based upon information made available to us up to the time of our reply and we have tried to refrain from speculating and conjecturing as to the consequences of proposed actions which we understood we may be requested to institute but as to which we have not been fully informed.

In an attempt to furnish to the Committee as much helpful information as we can at this time, we submit the following discussion of the specific questions contained in your letter.

I. ELABORATION OF ORIGINAL QUESTIONS

A. Answer 1. The formal report which we expect to receive from the Department of the Interior will be based upon an extensive investigation which has been conducted by that Department during the past year. We have been informally advised that the Bureau of Indian Affairs, under the supervision of the Office of the Solicitor, organized an investigating team which has spent many months in traveling throughout the Arctic Slope area, conferring with members of the Arctic Slope Regional Corporation and others and has compiled rather voluminous documentation of the alleged trespasses by third parties against lands which the plaintiffs in the *Edwardsen* case claimed to use and occupy. Those representatives of the Department of the Interior also have been in constant communication with counsel for the plaintiffs in *Edwardsen* and have sought as much information as plaintiffs' counsel can furnish regarding the alleged trespasses, including the names or identities of the trespassers, the description and location of the lands, the nature of the damages and other pertinent information.

As a result of informal conversations with representatives of the Office of the Solicitor of the Department of the Interior, we have been advised that the information which has been gathered is being assembled into a usable system by filing, indexing, and cross-indexing. We understand further that that task is nearing completion and that approximately 1,500 separate files containing information which may furnish the basis for that Department's recommendations for action, together with that Department's recommendation, will be transmitted to this Department in the very near future.

Because of the voluminous materials which have been described to us, we understand further that the Department of the Interior is contemplating the transmission of groups of proposed actions and in the beginning they are expected to be relatively few. In other words, we expect to receive initially requests for perhaps only 10 or

15 possible lawsuits and thereafter as further requests are processed by that Department, they will be submitted to us until we ultimately will be in receipt of requests for perhaps as many as 1,500 claims.

In view of this situation, obviously it is not possible to estimate with any certainty how long it will take this Department to conduct the examination of the formal reports to be submitted. In this connection, you are no doubt aware that on May 23, 1975, the Attorney General announced the creation of a new Indian Resources Section in this Division and that Section has been given the responsibility for conducting litigation for the protection of all natural resource interests of Indians. That Section will have the responsibility for conducting litigation based upon the reports which we are expecting the Department of the Interior to submit in this matter. Depending upon the completeness of the necessary and vital information to be furnished, it is my view that suits could be instituted against possible trespassers for damages to lands occupied by Natives quite promptly after adequate information is received. We would hope that in most instances, suit could be instituted within 30 days after a complete report is received, but this will depend upon the extent and complexity of the evidence, the legal research required, whether it is necessary to interview witnesses before pleadings can be drafted, and related matters.

Upon the filing of such suits, the time required for bringing any particular case to a conclusion will depend, of course, upon the extent of discovery and the state of the docket of the Court in which such cases may be filed.

In connection with the possible number of actions which may be instituted, we note that in his letter of June 17, 1975, to you, counsel for the plaintiffs informed you that although a review of public records and oil industry journals identified approximately 230 entities which physically entered the Arctic Slope prior to December 18, 1971, he has "no expectation that the number of suits to be filed will be anywhere near this magnitude." On the basis of the information informally furnished to us by the Department of the Interior, it would now appear that there may very well be as many as 1,500 claims to consider. It may be that some claims will not justify the filing of a case in court or that more than one claim may be asserted in a single case.

B. Answer 2. Based upon representatives made by counsel for the plaintiffs in *Edwardsen* and the observations of Judge Gasch during hearings on various motions in that case, it would appear that there is no doubt of the likelihood of the United States or its agencies becoming subject to suit for trespass or for breach of its fiduciary duty in the event plaintiffs in *Edwardsen* are not satisfied with the outcome of actions which may be brought in accordance with the stipulation entered into in that case. Counsel have from time to time indicated their intention of bringing such actions.

Title 25 U.S.C. 70a, which authorized suits before the Indian Claims Commission, by its terms provides "No claim accruing after August 13, 1946, shall be considered by the Commission." The time for filing expired August 13, 1951, 25 U.S.C. 70k. Accordingly, there is very little likelihood that suits for breach of the "fair and honorable dealings" clause of 25 U.S.C. 70a could be instituted. The Department of Justice would be involved in such suits as counsel for the defendant.

C. Answer 3. The measure of damages that could be utilized by a court for each type of trespass damage specified in the *Edwardsen* stipulation has been discussed quite extensively by counsel for the plaintiffs in his letter of June 17, 1975, and in the other letters to the Committee contained in the Report of the Committee published subsequent to the Hearing of May 16, 1975. The nature of the damages and the measure which we may contend for in any actions which may be instituted as a result of the Department of the Interior's recommendations will, of course, depend upon the facts in each case and our subsequent evaluations of the legal consequences in those cases. Apparently the claims are quite varied in nature and I do not believe it would be helpful to speculate on any legal opinions at this time.

D. Answers 5, 6 and 7. In further answer to these questions, we feel constrained to adhere to our original view and the contentions which we urged in support of the defendants' motion for summary judgment in the *Edwardsen* case. It is our view that the Alaska Native Claims Settlement Act extinguished all claims "based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska", etc., as expressly stated in Section 4(c) of that statute. It is our further view that that was the original intention of Congress in enacting that Section. Obviously the trial court in *Edwardsen* did not agree and we are, of course, aware of the disagreements of various interested parties as expressed in their responses to the Committee's inquiries.

The inclusion in Section 15 of S. 1824 of an analysis of supposedly relevant constitutional difficulties presented by that Section in our view would be inadvisable. As presently expressed, Section 15 makes it quite clear that when Congress enacted Section 4(c) of the Settlement Act, provided that all claims based on claims of aboriginal rights, etc., are extinguished, and provided compensation, it meant precisely what it said. As discussed in some of the legal memoranda furnished to the Committee by other parties to whom inquiries have been submitted and as stated by Senator Stevens, 121 Cong. Rec. S. 8962 et seq., that was the clear intent of Congress and the enactment of Section 15 as proposed in our view does not present any substantive constitutional difficulties. For this reason, we propose no legislative alternatives.

II. IMPACT OF EDWARDSSEN IN AREAS OTHER THAN THE ARCTIC SLOPE

A. If Natives in regions other than the Arctic Slope can demonstrate by credible evidence that lands which they used and occupied prior to the Alaska Native Claims Settlement Act were in fact damaged by third parties, then it would seem to follow that the rationale of the *Edwardsen* case could be utilized for suits by such Natives. In this connection, we note that in the letter of July 2, 1975, to you from Sam Kito, President, Alaska Federation of Natives, Inc., that he was unaware of any proposed suits by Native groups other than those of the Arctic Slope. However, it is worthy of note that until the *Edwardsen* case was instituted, the Department of the Interior had received no complaints by Natives of that region and no requests for institution of actions on their behalf.

B. 1. If the Department of the Interior were to recommend to this Department litigation on behalf of Natives in regions other than the Arctic Slope, this Department would, of course, entertain such recom-

mendations and in doing so would consider the legal basis to be that expressed in the *Edwardsen* holding—not the *Edwardsen* stipulation. The *Edwardsen* stipulation applies only to that litigation. This Department, of course, would first determine whether the information and factual background concerning such proposed or recommended actions warranted their institution.

2. If this Department determined that the evidence furnished or legal questions concerning the nature of any specific complaint would not furnish reasonable support for an action, we would, of course, decline to institute it. No such claims have been brought to our attention and we cannot anticipate why we might decide to file or decline to file actions.

III. EDWARDSSEN STIPULATION AND AGREEMENT

As we have indicated above, neither the Department of the Interior nor this Department was aware of any complaints by the Natives of the Arctic North Slope, and no request to the Department of the Interior for recovery of damages for any alleged trespasses had been submitted to that Department prior to the institution of *Edwardsen*. The first indication, as we have noted, was the institution of the *Edwardsen* case itself. The allegations in the original complaint concerning such alleged trespasses were vague generalities and the Department of the Interior, although it requested such information from plaintiffs, was not furnished any data as to either specific trespasses, location of lands, the identity of trespassers, or the specific nature of damages about which plaintiffs were complaining. After the decision on the defendants' motion for summary judgment, counsel for plaintiffs expressed his willingness to confer with representatives of the Department of the Interior and furnish to them such information as he possessed regarding the actions about which plaintiffs were complaining. After several conferences, the Department of the Interior concluded that on the basis of the *Edwardsen* holding, it would be justified in investigating the complaints and recommending appropriate action by the Department of Justice if the facts to be discovered so warranted. For those reasons, at the request of the Department of the Interior, we executed the stipulation on behalf of the Secretary and the other federal defendants.

IV. FURTHER JUDICIAL ACTION REGARDING THE EDWARDSSEN HOLDING

1-2. So long as the parties to *Edwardsen* are going forward in accordance with the stipulation, no further judicial proceedings are expected to be conducted in that case. The case is being held in abeyance pending compliance with the terms of the stipulation. Unless there is a breakdown in compliance with the stipulation and unless an appealable order were to be entered in that case, there would be no judicial alternatives for modifying or reversing the holding of the trial judge in that case.

3. It would appear that legislative action in the form of Section 15 of S. 1824 would provide, at this time, the only vehicle for modification or reversal of the holding in *Edwardsen*. As we have stated, only if an appealable order were to be entered in that case could further judicial review of that decision be obtained.

V. POTENTIAL CONFLICTS OF INTEREST

In response to the questions contained in this paragraph, we are unaware of any "conflict of interest" problems presented in *Edwardson* at the present time and on the present state of the information we have available. Should it develop that in some instances third-party trespassers damaged lands which the Natives claimed to use and occupy prior to the Alaska Native Settlement Act and should it develop that in those instances the third parties operated under authority of some license or power issued by a federal agency, a possible question of conflict might be presented. It is conceivable that if such a situation developed, this Department would find it necessary to inform the Natives it could not represent them and that they should proceed, if so advised, through tribal or private counsel.

This would seem to answer your request for a statement of procedures, usual or special, which this Department plans to adopt to minimize or eliminate conflict of interest possibilities in any subsequent judicial proceeding related to *Edwardson*. However, in this connection, we again call your attention to the recent establishment of the Indian Resources Section, which the Attorney General described in a press release of May 23, 1975, was created for the following purpose: This new litigating section will enable the Federal Government to better focus on the protection of all natural resource interests including land, water, hunting and fishing rights for the Indians.

You also observe that you are disappointed in the failure of the Administration to resubmit promptly to this Congress its Indian trust counsel proposal, "or consider any modification in its proposal to make it more acceptable to the wishes of the Indian community." On June 20, 1975, A. Mitchell McConnell, Jr., Acting Assistant Attorney General, wrote you at some length discussing the Indian trust counsel proposal. A copy of that letter is enclosed for your convenience.*

Sincerely,

WALLACE H. JOHNSON,
Assistant Attorney General.

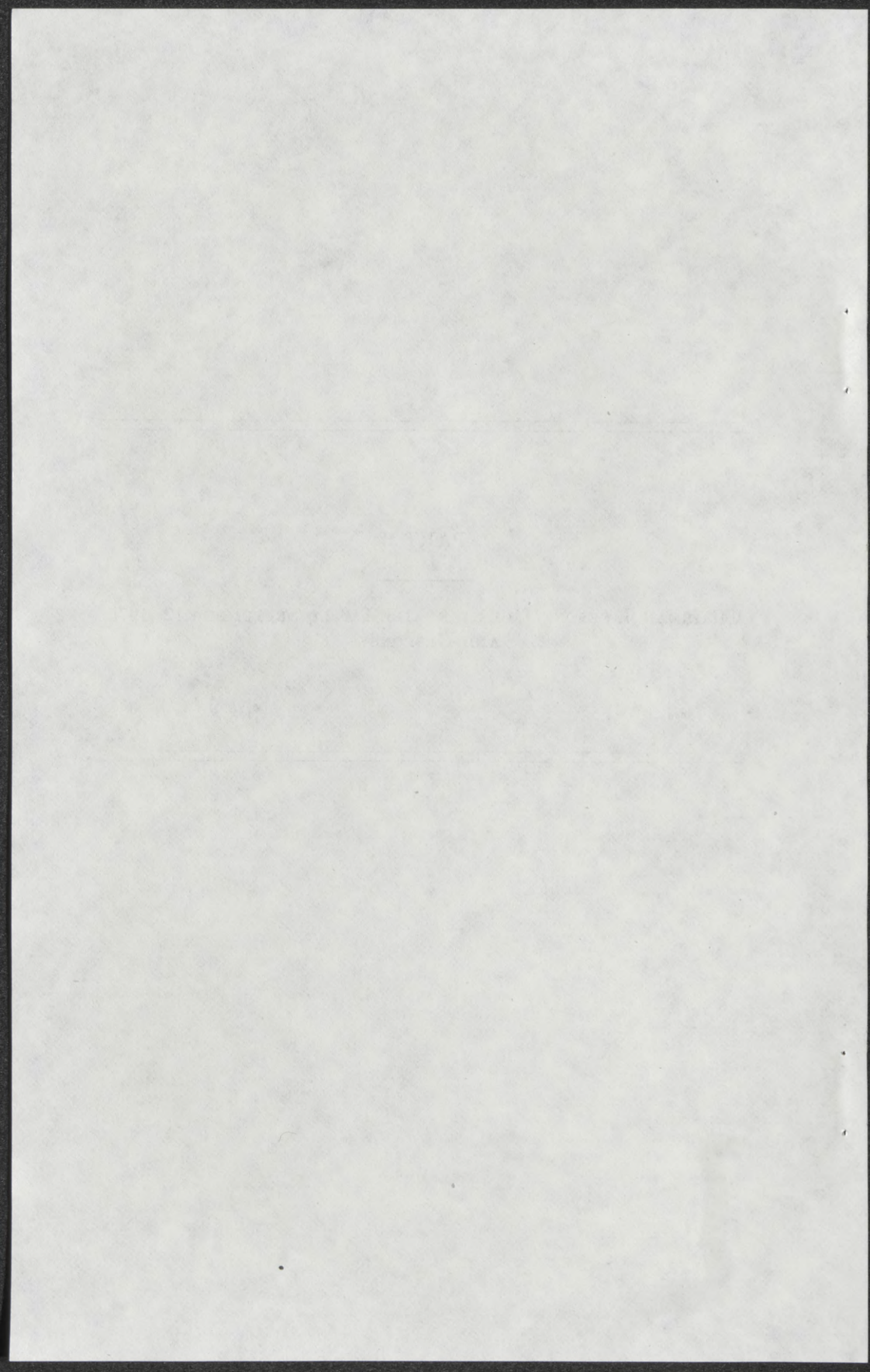
Enclosure.

*The letter was retained in the committee files.

PART B

CHAIRMAN JACKSON'S QUESTIONNAIRE DATED SEPTEMBER 12, 1975
AND RESPONSES

(719)



SEPTEMBER 12, 1975.

DEAR MR. —: Thank you for taking time to answer my letter of June 3 requesting your views on several specific issues raised by the decision of the Court in *Edwardsen V. Morton*.

The responses to my letter have now been compiled and analyzed by the Committee staff. Many of the responses did suggest several alternatives to Section 15 of S. 1824, as introduced by Senator Stevens, for which I now seek your reactions and comments. In general, these suggestions can be broken into the following categories:

1. No action whatsoever by the Congress.
2. Retroactive expression of Congressional intent in appropriate legislative form.
3. Congressional action to establish a procedure for, and to mandate expedited judicial review of, the opinion of the Court in the *Edwardsen* case.
4. Creation of an administrative entity, similar to the Pueblo Indian Lands Board, to resolve the Native claims involved.
5. Legislative abolition of third-party claims for indemnification against the State of Alaska and the Federal Government.
6. A complete legislative settlement of the Native claims, similar in nature to the original Settlement Act.

Hearings have been scheduled for September 24 to consider these suggestions, as well as other proposed amendments to the Settlement Act. Given the brief time set aside for oral testimony, the Committee will make extensive use of written materials submitted by the parties. I therefore urge you to provide the Committee extensive, detailed reactions to, and analysis of, the alternatives to Section 15 of S. 1824 outlined above. Do not feel constrained to focus exclusively on the advantages of a particular proposal; the Committee wishes to be informed of the disadvantages as well. Please feel free to suggest and comment upon any alternatives not set forth above of which you may be aware. The Committee, of course, has made no decision as to which, if any, Congressional action concerning the *Edwardsen* case, is appropriate. Such a decision will be made only after careful analysis of all the responses and the hearing record. It is essential that the responses to this letter be received no later than September 22 to permit the Committee staff to compile and analyze them and distribute them to the Members.

I wish to extend an invitation to you to present testimony at the September 24 hearing. Any prepared statement should be limited to five minutes and should be submitted to the Committee the day before presentation. Please notify Committee Counsel, Steven P. Quarles (202) 224-9894 of the name of the representatives you choose to present the testimony.

I look forward to receiving your response and hearing your views on this matter.

Sincerely yours,

HENRY M. JACKSON, *Chairman.*

(721)

DAVIS, WRIGHT, TODD, RIESE & JONES,
Seattle, Wash., September 22, 1975.

HON. HENRY M. JACKSON,
*Chairman, Committee on Interior and Insular Affairs,
 U.S. Senate, Washington, D.C.*

DEAR SENATOR JACKSON: The thoughtful manner in which the Senate Committee on Interior and Insular Affairs is considering § 15 of S. 1824 is appreciated by Arctic Slope Eskimos. On behalf of the *Edwardsen* plaintiffs we are pleased to answer your letter of September 11, 1975. We also enclose a memorandum responding to legal issues raised in briefs submitted on behalf of the State of Alaska on June 17 and July 1, 1975.

1. NO ACTION WHATSOEVER BY THE CONGRESS

A well respected federal judge, in a long and thoughtful opinion, has ruled that the Alaska Native Claims Settlement Act (hereinafter "Settlement Act") did not and, constitutionally could not, extinguish the accrued trespass claims of Arctic Slope Eskimos against various entities which entered Arctic Slope lands without the Eskimos' permission at a time when the Eskimos' exclusive use and occupancy of those lands was guaranteed by the United States. *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973). Subsequent to that decision the United States, through the Departments of Justice and Interior, in recognition of its fiduciary duty to Arctic Slope Eskimos, formally agreed to seek full recovery for Arctic Slope Eskimos for all pre-Settlement Act trespasses to their aboriginal lands.

On September 19, 1975, the Justice Department reported to United States District Judge Oliver Gasch that filing of the trespass actions is imminent. The primary defendants in the lawsuit, will be those large oil companies which undertook to explore for oil on the Arctic Slope by trespass rather than by obtaining the permission of its inhabitants. Those companies clearly have the financial resources to satisfy any judgments which may be entered against them.

Issues raised by the *Edwardsen* case are complex and highly technical. They are peculiarly susceptible to judicial resolution. They should be left—where they are—in the federal courts. Section 15 of S. 1824 and any other legislative attempt to extinguish, without just compensation, accrued trespass claims of Arctic Slope Eskimos would raise questions many times more complex, politically sensitive and constitutionally dangerous than those that will be raised by the trespass litigation. Accordingly, it appears to the *Edwardsen* plaintiffs that no action whatsoever by the Congress would be the best congressional response to § 15 of S. 1824.

The position of the *Edwardsen* plaintiffs on other alternatives is set forth in our answers to questions 2 through 6. Each such alternative, in the view of the *Edwardsen* plaintiffs, has at least one serious constitutional or political infirmity.

2. RETROACTIVE EXPRESSION OF CONGRESSIONAL INTENT IN APPROPRIATE LEGISLATIVE FORM

Arctic Slope Eskimos would not object to an expression of present congressional intent that:

a. The 92nd Congress did not intend to extinguish the accrued trespass claims of Arctic Slope Eskimos against companies who trespassed upon their aboriginal lands prior to December 18, 1971; or that,

b. Congress did not intend in 1971 to take any Fifth Amendment rights from Arctic Slope Eskimos.

However, the *Edwardsen* plaintiffs do not think that any expression by the present Congress about the intent of the 92nd Congress is necessary or, from a policy standpoint, wise.

If the 92nd Congress extinguished the trespass claims of Arctic Slope Eskimos when it adopted § 4(c) of the Settlement Act, there is no need for any expression of legislative intent by the 94th Congress. When the Department of Justice files the trespass actions, the defendants will file a § 4(c) motion for dismissal and the federal courts will dismiss the complaints.

If the 92nd Congress did not extinguish the Eskimos' trespass claims, it is clear that any expression of legislative intent by the 94th Congress would be a new legislative enactment. In that event, Congress is being asked by the proponents of § 15 of S. 1824 to assume the functions of the Federal District Court for Alaska, the Ninth Circuit Court of Appeals, and the Supreme Court of the United States and to decide the Eskimos' trespass case in favor of the oil companies.

If the 94th Congress were to attempt to interpret what the 92nd Congress intended in 1971; and if the 94th Congress were to decide that the 92nd Congress intended to extinguish the accrued trespass claims of Arctic Slope Eskimos; and if the Federal court chose to accept that legislative interpretation, because those claims are protected by the Fifth Amendment, the 94th Congress would have placed in mortal danger the Settlement Act passed by the 92nd Congress after five years of extensive hearings and deliberations.

For reasons set forth in the *Edwardsen* decision (Extinguishment Amendment Hearings, Part 2 at 1379); Part II of the attached memorandum and statements of the *Edwardsen* plaintiffs before this committee on May 16, 1975 (Extinguishment Hearings, Part I at 104, 105), a present or retroactive extinguishment of protected rights would result in full judicial scrutiny of the entire Settlement Act and possible constitutional invalidation of either the entire Act or only § 4, leaving the extinguishment of aboriginal title to another Congress. Section 4, as reinterpreted or amended, might be unconstitutional only insofar as it purports to extinguish the aboriginal title of parties with accrued trespass claims. It is certain, however, that a present legislative attempt to reinterpret the 1971 Settlement Act could cause grave and unpredictable consequences for the State of Alaska, Alaska Natives and the United States. *Edwardsen* plaintiffs are not aware of any valid arguments that would justify such risks.

3. CONGRESSIONAL ACTION TO ESTABLISH A PROCEDURE FOR, AND TO MANDATE EXPEDITED JUDICIAL REVIEW OF, THE OPINION OF THE COURT IN THE EDWARDSSEN CASE

Based upon representations of the Department of Justice on September 19, 1975, to United States District Judge Oliver Gasch, the filing of a complaint by the United States against a substantial number of defendants is imminent. If the defendants in that action genuinely believe that § 4 of the Settlement Act is a full defense to the trespass claims filed against them, then they will presumably plead it as a defense.

Prompt appellate review of the trial court's legal ruling on that issue is available to the losing party by appeal or by a request for certification under 28 U.S.C. 1292(b). Accordingly, it appears to the *Edwardsen* plaintiffs that, at this time, little of value would be achieved by special congressional action creating an extraordinary procedure for expedited judicial review of the *Edwardsen* case itself in the District of Columbia.

If Congress decides that the national interest mandates unusual judicial haste, legislation might be possible to allow a direct appeal from the Alaska District Court to the Supreme Court of any decisions rendered on the trespass actions to be filed by the United States. Alternatively, Congress could establish a special three-judge court to hear the trespass claims of the United States against the actual trespassers and provide that appeals of that decision would be made directly to the Supreme Court. Lastly, Art. III, § 2, Cl. 2 of the United States Constitution provides that: In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction.

It appears that individual parties whose presence is necessary or proper for the determination of the case or controversy may properly be joined as parties defendant to original actions filed in the Supreme Court. *Cf. United States v. West Virginia*, 295 U.S. 463, 470 (1935); *State of Texas v. State of Florida, et al.*, 306 U.S. 398, 405 (1939). Accordingly, Congress could direct the United States to file its trespass complaints directly in the Supreme Court or to transfer the claims it will already have filed from the Alaska District Court to the Supreme Court.

4. CREATION OF AN ADMINISTRATIVE ENTITY, SIMILAR TO THE PUEBLO INDIAN LANDS BOARD, TO RESOLVE THE NATIVE CLAIMS INVOLVED

This suggestion may merit further study. Neither the *Edwardsen* plaintiffs nor their counsel know whether the Pueblo Indians were treated fairly by the Pueblo Indian Lands Board. If adequate compensation were provided in a timely and expeditious manner to Arctic Slope Eskimos, the approach would presumably avoid a constitutional challenge. It would not endanger the Settlement Act, directly challenge the separation of powers, or abnegate the fiduciary duty of the United States to Native Americans.

The principal deficiency in this proposal appears to be that it would make the United States liable for the trespass of private com-

panies who reaped enormous benefits from their calculated trespasses on the Arctic Slope. It has been and still is the position of the *Edwardson* plaintiffs that the United States should not pay for intentional oil industry torts unless the United States first fails to recover full damages from them.

5. LEGISLATIVE ABOLITION OF THIRD-PARTY CLAIMS FOR INDEMNIFICATION AGAINST THE STATE OF ALASKA AND THE FEDERAL GOVERNMENT

Lease contracts between the State of Alaska and private lessees of Arctic Slope oil lands expressly provide that the leases were "without warranty" and that the lessee bears all the risks of deficiencies in the State's title. Accordingly, the legal basis for indemnity claims of third-party trespassers against the State of Alaska is not apparent. Thus far, none of the parties who have raised the possibility of indemnity claims against the State have attempted to explain the legal basis for such an assertion. Nevertheless, legislative abolition of third-party indemnification claims against the State of Alaska would alleviate any genuine concern about this aspect of the State's exposure.

Abolition of third-party indemnification claims would not protect the State from the consequences of its own trespasses to the Arctic Slope. That exposure, however, was expressly contemplated by both Congress and the State of Alaska in § 4 of the Alaska Statehood Act in which the State solemnly promised that it would never assert any right to lands held by Alaska Natives under unextinguished aboriginal title: As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction of the United States until disposed of under its authority. . . .

Alaska's asserted claims to Arctic Slope lands and its direct trespasses, such as the Hickel Highway prior to the extinguishment of the Eskimos' aboriginal title, were outright breaches of this compact. For this reason it is only fair that the State should be subject to liability for its actual trespasses to the lands of Arctic Slope Eskimos.

Accordingly, this particular alternative would not protect the State from the consequences of its own trespasses. It might create some exposure in the United States for "takings" of those third-party claims which have legal merit. It would be troublesome to third-party trespassers. It would not endanger the Settlement Act, abnegate the fiduciary duty of the United States to Native Americans, or relieve private trespassers of the economic consequences of their deliberate torts.

Legislative abolition of third-party indemnification claims against the United States would not appear to be effective for such action would merely convert those claims to a "taking" claim.

6. A COMPLETE LEGISLATIVE SETTLEMENT OF THE NATIVE CLAIMS,
SIMILAR IN NATURE TO THE ORIGINAL SETTLEMENT ACT

If compensation acceptable to Arctic Slope Eskimos were paid in a timely manner, a legislative settlement would probably avoid constitutional challenges. It would not endanger the Settlement Act, challenge the independence of the federal courts or abnegate the fiduciary duty of the United States to Native Americans.

However, it is not clear to Arctic Slope Eskimos that a full legislative settlement would be as timely as judicial resolution of their trespass claims. Passage of the Settlement Act required five years of extensive hearings and deliberations.

If Congress were to conclude that the national interest would be best served by transferring liability for oil industry trespasses from the tortfeasor companies to the United States, an intentional and full legislative settlement would be a more responsible means of accomplishing such a transfer than the indirect method outlined in § 15 of S. 1824.

Section 15 of S. 1824 raises difficult issues requiring careful consideration. Please let us know if we can be of further assistance to you or the committee staff.

Sincerely yours,

O. YALE LEWIS, JR.

Attachment.

MEMORANDUM

LEGAL ISSUES RAISED BY
PROPOSERS OF § 15 OF S. 1824,
THE PROPOSED TRESPASS CLAIMS
EXTINGUISHMENT AMENDMENT

submitted

by

INUPIAT COMMUNITY OF THE ARCTIC SLOPE

ARCTIC SLOPE NATIVE ASSOCIATION

ARCTIC SLOPE REGIONAL CORPORATION

September 22, 1975

Davis, Wright, Todd, Riese & Jones
4200 Seattle-First Nat'l Bank Bldg.
Seattle, Washington 98154

MEMORANDUM

LEGAL ISSUES RAISED BY
 PROPONENTS OF § 15 OF S. 1824,
 THE PROPOSED TRESPASS CLAIMS
 EXTINGUISHMENT AMENDMENT

INDEX

I.	SUMMARY	1
II.	A CAUSE OF ACTION FOR TRESPASSORY CONDUCT IS PROPERTY PROTECTED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND MAY BE TAKEN ONLY FOR PUBLIC PURPOSES AND WITH PAYMENT OF JUST COMPENSATION	4
	A. Claims for Damage Based on the Common Law are Property Protected by the Constitutional Requirements of Due Process and Payment of Just Compensation	4
	B. Both Tort and Contract Claims Based on the Common Law are Protected by Due Process and Just Compensation Requirements	9
	C. Trespassory Conduct Gives Rise to Claims for Damage Sounding in Both Tort and Contract	12
	D. Legislation Extinguishing the Trespass Claims of Arctic Slope Eskimos, if Constitutional, Would Subject the United States Treasury to Substantial Liability for the Taking of Those Claims	15
	E. The Settlement Act was not "Just Compen- sation" for the Trespass Claims of Arctic Slope Eskimos	17
III.	THE ALASKA NATIVE CLAIMS SETTLEMENT ACT OF DECEMBER 18, 1971, DID NOT EXTINGUISH TRESPASS CLAIMS OF ARCTIC SLOPE ESKIMOS	23
	A. The Congressional Purpose in Providing for a Legislative Settlement of Alaska Native Land Claims was to Remove the Cloud on Title to Alaska Lands	23

B.	Congress did not Intend to Extinguish Property Rights Protected by the Fifth Amendment	26
C.	The Language and Legislative History of Section 4(c) Expressly Preserve Tort Claims of Alaska Natives and Provide no Persuasive Support for the Proposition that the Act Extinguished Accrued Trespass Claims	30
IV.	ARGUMENTS BY THE STATE OF ALASKA THAT THE FIFTH AMENDMENT DOES NOT APPLY TO THE PROPERTY RIGHTS OF INDIANS HAVE NO BASIS IN AMERICAN LAW	41
A.	The Argument that Indian Possessory Rights are Inferior to those of the White Man	41
B.	The Argument that Indian Possessory Rights may be Extinguished Because they are Based on Statutory Rights	47
C.	The Argument that Congress can Retroactively Ratify Trespasses to the Arctic Slope	48
V.	ARCTIC SLOPE ESKIMOS ARE NOT BARRED FROM RAISING THEIR DAMAGE CLAIMS FOR TRESPASSORY CONDUCT BY ACCEPTING BENEFITS UNDER THE SETTLEMENT ACT AND HAVE NOT RELINQUISHED THOSE CLAIMS	53
A.	No Acceptance of Benefits Rule Applies	53
B.	Arctic Slope Eskimos have Never Relinquished Damage Claims for Pre-Settlement Act Trespasses	55

MEMORANDUMLEGAL ISSUES RAISED BY PROPONENTS OF
§ 15 OF S. 1824, THE PROPOSED TRESPASS
CLAIMS EXTINGUISHMENT AMENDMENTI. Summary

The proposal to extinguish the accrued trespass claims of Arctic Slope Eskimos through enactment of § 15 of S.1824 raises serious constitutional questions. Causes of action based on the common law, whether sounding in tort or contract, are property rights protected by the Fifth Amendment. Part II (A) infra.

Arguments by the State of Alaska that tort claims are not entitled to Fifth Amendment protection lack any legal merit, Part II (B) infra, and are, in any event, irrelevant because the Eskimos' most substantial damage actions will be quasi-contract claims which are conceded to be Fifth Amendment rights by the State. Part II (C) infra.

Enactment of § 15 of S.1824 might be a violation of the Fifth Amendment's requirement that private property may be taken only for public use. No public benefit would accrue to the American people from an act shifting substantial liability

for intentional tortious acts from the wrongdoers to the United States Treasury. If § 15 of S.1824 were not held to be unconstitutional, it would still impose a substantial obligation on the United States to provide "just compensation" for the taking of the Eskimo's property. Part II (D) infra. Settlement Act funds could not be used to satisfy this obligation. Part II (E) infra.

The United States did not incur liability for a taking of the Eskimos' trespass claims in 1971 when the Settlement Act became law because the Act did not extinguish them. Congress enacted the Settlement Act to clear up a cloud on title to Alaska's lands, Part III (A) infra, not to take the Fifth Amendment property rights of Alaska citizens. Part III (B) infra. Tort claims were expressly preserved. Part III (C) infra.

Arguments that Indian trespass claims have less constitutional protection than those of other American citizens are without merit. Until extinguished by Congress, Indians have the same rights to quiet enjoyment of their lands and the same rights to invoke judicial protection in aid thereof as do other American citizens. Part IV (A) infra. Indian possessory rights are based on the common law, Part IV (B) infra, and, like other Fifth Amendment rights, cannot be infringed by attempts to give ratification retroactive effect Part IV (C).

Arctic Slope Eskimos are not precluded from asserting their trespass claims by any rule of constitutional adjudication; Part V (A) infra. At no time have Arctic Slope Eskimos relinquished their trespass claims -- in exchange for enactment of the Settlement Act or anything else. Part V (B) infra.

The exclusively legal nature of the arguments made by the proponents of § 15 of S.1824, and the responses herein, show that the Edwardsen trespass claims are clearly a "case of controversy" within the meaning of Article III, § 2, Cl. 1, of the United States Constitution. Their resolution is within the exclusive jurisdiction of American courts. The dramatic intervention in the judicial process called for by § 15 of S.1824 would be a violation of the separation of powers and a most unfortunate congressional precedent.

II. A CAUSE OF ACTION FOR TRESPASSORY CONDUCT IS PROPERTY PROTECTED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND MAY BE TAKEN ONLY FOR PUBLIC PURPOSES AND WITH PAYMENT OF JUST COMPENSATION.

S.1824, § 15, seeks to extinguish accrued claims of Alaska Natives for trespass to lands held under aboriginal title prior to December 18, 1971, the effective date of the Alaska Native Claims Settlement Act. In written submissions to this Committee the State of Alaska and the Department of Justice have argued that such extinguishment would not be unconstitutional because claims for trespassory conduct are not protected by the Fifth Amendment to the United States Constitution. That contention is contrary to the virtually unanimous declaration of American courts that causes of action based on the common law, whether in tort or contract, are property protected by the due process and just compensation requirements of the United State Constitution.

A. Claims for Damage Based on the Common Law are Property Protected by the Constitutional Requirements of Due Process and Payment of Just Compensation.

A claim for damages, whether arising out of tortious conduct or breach of contract, is indisputably property.

While by a "chose in action" is ordinarily understood a right of action for money arising under contract, the term is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property. It embraces demands arising out of a tort, as well as causes of action originating in a breach of contract. A thing in action, too, is to be regarded as property.

City of Cincinnati v. Hafer, 49 Ohio St. 60, 30 N.E. 197 (Sup. Ct.), quoted with approval in Williams v. Atlantic Coastline R. Co., 69 S.E. 402, 403 (N. C. 1910); See Affiliated Ute Citizens of the State of Utah v. United States, 406 U.S. 128, 136-40 (1972) liquidated and unliquidated causes of actions treated as tribal assets).

"Property" subject to constitutional protection in the United States encompasses more than just tangible objects and includes interests and expectations of many kinds.

"[P]roperty" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules of understandings."

Perry v. Sinderman, 408 U.S. 593, 601 (1972) (expectancy of re-employment is property subject to due process guarantees). Just as houses, land, automobiles and other property of United States citizens are protected by the Constitution, so too are claims for money damages.

Hence it is that a vested right of action is property in the same sense in which tangible things are property, and it is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.

Pritchard v. Norton, 106 U.S. 124, 27 L. Ed. 104, 107 (1882), accord, Gibbes v. Zimmerman, 290 U.S. 326, 333 (1933)

(dictum). Indeed, the proposition that causes of action are property protected by due process is so fundamental that it is black letter law in the legal encyclopedias. See 16 Am. Jur. 2d "Constitutional Law" § 424 (1964); 16A C.J.S. "Constitutional Law" § 599 at 698 (1956).

Ettor v. City of Tacoma, 228 U.S. 148, (1913), stands squarely for the proposition that a cause of action is a property right protected by the Constitution. The City of Tacoma graded a street and damaged abutting property at a time when a state statute required payment of compensation for such damage. After the damage had occurred, the state legislature repealed the statute. The court held that the subsequent repeal of the statute could not constitutionally extinguish the damage claim which had arisen while the statute was in force.

The necessary effect of the repealing act as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, -- a right which was in every sense a property right.

228 U.S. at 156.

Ettor cannot be distinguished on the grounds that it applies only to damages for breach of contract. There was no contract in Ettor. The obligation to pay damages was imposed by the State in the form of a statute. By grading a street and

causing consequential damage to abutting property owners, the City of Tacoma gave no more a promise to pay damages than does a trespassor who enters the lands of another and causes damage.

The only difference between the damage claim asserted in Ettor and the trespass claims of Arctic Slope Eskimos is that the obligation to pay damages in Ettor was imposed by statute whereas the obligation to pay damages for trespass to Indian lands is imposed by federal common law. If this difference had any constitutional significance, it is that causes of action based on the common law are entitled to greater protection against uncompensated legislative extinguishment. See, e.g., State of Alaska, "Constitutional Issues Relating to the Extinguishment of Native Trespass Claims," Hearings Before the Senate Committee on Interior and Insular Affairs, Amendments to the Alaska Native Claims Settlement Act, Part 2, at 74-78 (1st Sess. 1975) [hereinafter Extinguishment Amendment Hearings].

An express holding that tort claims are protected by the Fifth Amendment occurred in Farbwerke, Meister, Lucius & Bruning v. The Chemical Foundation, 39 F.2d 366 (3d Cir. 1930), aff'd 283 U.S. 152. Farbwerke involved a claim for patent infringement which is a tort. Shillinger v. U.S., 155 U.S. 163 (1894). In Farbwerke certain German patent owners brought suit to recover royalties on certain patents which had

been taken from them during World War I and sold by the United States. The Farbwerke plaintiffs alleged that a subsequent statute enacted by the United States retroactively restored in them ownership of the royalties accruing on the patents. The Third Circuit held squarely that insofar as the statute did act to transfer the right to sue for accrued royalties from the present owners to other persons it was unconstitutional.

The right to accrued royalties, in whomsoever vested, is a chose in action; a chose in action is property; and an act which takes property from one person and gives it to another without legal procedure to determine their rights and without compensation is a deprivation of property without due process of law and is violative of the Fifth Amendment to the Constitution.

39 F.2d at 371 (emphasis added).

Numerous state court decisions have also held that causes of action based on the common law, whether sounding in tort or contract, are protected by the due process and just compensation requirements of the United States Constitution.

[The due process clause and the just compensation clause of the Fifth Amendment] prohibit the passage of a law depriving [a citizen] or authorizing the depriving him of his property, except through judicial sentence or upon just compensation. The right to damages, to be recovered in a civil action, for false imprisonment, is a chose in action -- is property -- and passes to one's representatives at death by the law of Indiana.

Griffin v. Wilcox, 21 Ind. 370, 373 (1863).

A legal right to damage for an injury is property and one cannot be deprived of his property without due process. There can be no due process unless the party deprived has his day in court . . .

Rosane v. Singer, 112 Colo. 363, 149 P. 2d 372, 375 (1944);
accord, Williams v. Atlantic Coastline R. Co., 69 S.E.2d 403
 (N. C. 1910); Citron v. Mangel Stores Corp., 50 N.Y.S. 2d 416
 (Sup. Ct. 1944).

Legislative extinguishment of a cause of action based on the common law has been almost uniformly held to be a violation of due process.

The statute provides a rule of substantive law. The effect of the change, if given retrospective effect, would be to deprive plaintiff and others similarly situated of a right of action. This court has recognized that a common law right of action is property and entitled to protection.

Cusick v. Feldpausch, 259 Mich. 349, 342 N.W. 226, 227 (1932).

This rule [that the legislature can abolish statutory remedies and therefore a cause of action at any time] only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case it is generally stated that the cause of action is a vested property right which may not be impaired by legislation.

Callet v. Alioto, 290 P. 438, 440 (Cal. 1930).

- B. Both Tort and Contract Claims Based on the Common Law are Protected by Due Process and Just Compensation Requirements.

In its supplemental memoranda submitted to this Committee, the State of Alaska, conceding that claims based on contract

are protected by the Fifth Amendment, suggested that tort claims might not be accorded the same protection. Extinguishment Amendment Hearings, Part 2, at 71. However, the State cited no cases holding that tort claims are not protected by the Fifth Amendment. Indeed, in a later section of its brief the State conceded, in effect, that trespass actions are protected by the Fifth Amendment.

A trespass action is, in essence, a means of making whole the owner of an interest in land where that interest has been wrongfully invaded and thereby diminished in value. Most interests in land, such as a fee simple, are themselves constitutionally protected from uncompensated governmental taking. To preserve those protected interests intact, it may be necessary to hold that an accrued trespass action, which would make whole the owner of the interest, is also constitutionally protected.

Extinguishment Amendment Hearings, Part 2, at 72.

This begrudging concession by the State obscures the fact that the vast majority of American courts have recognized that most interests protected by the sovereign are property subject to constitutional protections regardless of whether the remedy for interference with those interests sounds in tort or contract. None of the federal and state court decisions discussed above, which hold that causes of action are protected by due process, make any distinction between tort and contract claims. Indeed, many of those cases involve classic tort claims. Martinez v. Fox Valley Buslines, 17 F. Supp. 576

(N.D. Ill. 1936) (personal injury); Rosane v. Singer, 112 Colo. 363, 149 P. 2d 372 (1944) (medical malpractice); Williams v. Atlantic Coastline Ry. Co., 69 S.E.2d 402 (N.C. 1910) (wrongful ejection from train); Griffin v. Wilcox, 21 Ind. 370 (1863) (false imprisonment).

The rule that an accrued cause of action based on the common law is a vested property right which may not be extinguished by the legislature has been expressly applied to tort claims.

The rule that repeal does not operate to affect vested rights is applicable not only to those acquired under contract but also to vested rights of action to recover damages for torts.

Massa v. Nastri, 125 Conn. 144, 3 A.2d 839, 120 A.L.R. 939, 942 (1939) (citations omitted); accord, Pickering v. Peskind, 43 Ohio App. 401, 183 N.E. 301, 303 (1930); Callet v. Alioto, 290 P. 438 (Cal. 1930); County of Los Angeles v. Superior Court of Los Angeles, 43 Cal. Rptr. 392, 395 (Dist. Ct. App. 1965); Jones v. City of Los Angeles, 30 Cal. Rptr. 124, 125 (Dist. Ct. App. 1963).

Accrued causes of action based on the common law are protected by the due process and just compensation requirements of the United States Constitution whether sounding in tort or contract. The contention that a different rule applies to tort claims is a disservice to this Committee's effort to evaluate the constitutional consequences of § 15 of S.1824.

C. Trespassory Conduct Gives Rise to Claims for Damage Sounding in Both Tort and Contract.

The State of Alaska's attempt to draw a distinction between the constitutional protections afforded tort and contract claims is, in any event, irrelevant because the claims of Arctic Slope Eskimos against those parties who entered their lands without consent include claims arising in tort for trespass and claims arising in quasi-contract for the benefits obtained by the trespassers. The State has conceded that quasi-contractual causes of action are protected by the Fifth Amendment.

[W]here the conduct of the parties gives rise to a quasi-contractual obligation, a cause of action founded in that obligation cannot be extinguished without compensation.

Extinguishment Amendment Hearings, Part 2, at 70.

It is a well settled rule of common law that when a trespasser enters onto the lands of another and uses those lands for his benefit or takes something of value from the lands, the possessor of those lands may waive the right to sue for the "naked trespass," and claim instead in quasi-contract for the value conferred on the trespasser for the use of the lands.

An action will lie for recovery of the reasonable value of the use and occupation of real property irrespective of the question of whether or not the use thereof by the occupant was tortious or wrongful. In such a case the tort, if any, may be waived and an action based upon implied assumpsit is maintainable to recover the

value of the use of the real property for the time of such occupation, where no special damages are sought.

Herond v. Bonsall, 140 P.2d 121, 123 (Dist. Ct. App. Cal. 1943), quoted with approval in Richard v. Mead, 297 P. 2d 600, 682 (Dist. Ct. App. Cal 1956), and Meyer v. Parobek, 259 P.2d, 948, 951 (Dist. Ct. App. Cal. 1953).

Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946), is a classic case illustrating the right of a plaintiff to recover in quasi-contract for the benefits obtained by a trespasser. In that case the defendant coal company secured an easement to haul coal across the plaintiff's land from one certain tract of land and then used the easement for transportation of additional coal from other tracts of land. The court held that the coal transported in excess of the easement was a trespass and that the plaintiff was entitled to recover damages from the defendant in the amount by which the defendant had been enriched by using the easement for transporting the additional coal. The court squarely rejected an argument that the quasi-contractual damages could not be awarded because the trespass did not cause physical damage to the plaintiff's land.

To hold that a trespasser who benefits himself by cutting and removing trees from another's land is liable on an implied contract, and that another trespasser who benefits himself by the illegal use of another's land is not liable on an implied contract is illogical. The only distinction is that in one case the benefit he

received is a diminution of another's property. In the other case, he still receives the benefit but does not thereby diminish the value of the owner's property. In both cases, he has received substantial benefit by his own wrong. As the gist of the action is to prevent the unjust enrichment of a wrongdoer from illegal use of another's property, such wrongdoer should be held on an implied promise in both cases.

.

The illegal transportation of the coal in question across plaintiff's land was intentional, deliberate and repeated from time to time over a period of years. Defendant had no moral or legal right to enrich himself by this illegal use of plaintiff's property. To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received. Defendant's estate has been enhanced by just as much.

39 S.E.2d at 236-38 (emphasis added).

This implied promise to pay for the benefits received by a trespasser has been recognized by the Supreme Court. Lazarus v. Phelps, 152 U.S. 81 (1893) (recovery allowed in quasi-contract for benefit to defendant of grazing cattle on plaintiffs land), and by federal courts of appeal. See, e.g., Shell Petroleum Corp. v. Scully, 71 F2d 772 (5th Cir. 1934) (geophysical trespass gives rise to damage claim for benefit conferred on trespasser).

Although great physical damage was done to the land, homes, sacred places, and personal property of Arctic Slope Eskimos, the major damage claims to be brought on their behalf will be for the enormous benefits reaped by the oil company trespassers to the Arctic Slope prior to the extinguishment of the Eskimos' aboriginal title. Those trespasses generated geophysical information of enormous value and allowed certain oil companies to obtain leases worth millions of dollars. Other benefit was obtained by the extraction of oil, gas water, sand and gravel and through the use of many surface areas on the Arctic Slope for profit-making activities. The claims of Arctic Slope Eskimos for damages resulting from these activities will all sound in quasi-contract and are, as the State of Alaska concedes, fully protected by the Fifth Amendment against uncompensated legislative extinguishment.

D. Legislation Extinguishing the Trespass Claims of Arctic Slope Eskimos, if Constitutional, Would Subject The United States Treasury to Substantial Liability for the Taking of Those Claims.

The claims of Arctic Slope Eskimos for trespasses to the Arctic Slope prior to December 18, 1971, are property rights fully protected by the due process and just compensation requirements of the United States Constitution. Under those constitutional provisions, accrued causes of action may not be extinguished by the Congress of the United States except for a public use with payment of just compensation.

Nor [shall any person] be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment V. Enactment of any legislation which had the effect of preventing Arctic Slope Eskimos from presenting their damage claims for trespassory entries to the Arctic Slope to American Courts would, under the Fifth Amendment, either be unconstitutional or would subject the United States to liability for the full dollar value of the claims.

Because the major consequence of § 15 of S. 1824 would be to relieve certain private parties from liability for their willful trespasses on the Arctic Slope of Alaska, Arctic Slope Eskimos do not believe that a taking effected by this legislation would be for a "public use" within the meaning of the Just Compensation Clause of the Fifth Amendment. It would be a taking of property belonging to Arctic Slope Eskimos for the benefit of private tortfeasors which is constitutionally impermissible. Swan Lake Hunting Club v. United States, 381 F. 2d 238, 241 (5th Cir. 1967), citing O'Neill v. Leamer, 239 U.S. 244 (1915).

Even if extinguishment of damage claims against oil companies and their joint tortfeasors were found to be a taking for "public use" and hence constitutional under the Fifth

Amendment, the requirements of due process and just compensation would oblige the United States to pay Arctic Slope Eskimos the "full monetary equivalent" of their tort claims. United States v. Reynolds, 397 U.S. 14, 15-16 (1970). Just as the United States pays a homeowner when his house is condemned to make way for a highway, it would be required to pay the Eskimos for its condemnation of their tort claims.

Although Congress might constitutionally effect a taking of Eskimo tort claims by enacting § 15 of S. 1824, it could not determine how much the United States would pay for them because the question of what constitutes "just compensation" is determined exclusively by the courts. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893). Consequently, if § 15 of S. 1824 were not held to be unconstitutional, its effect would be to subject the United States Treasury to substantial liability in the courts for the taking of extraordinarily valuable property rights.

E. The Settlement Act Was Not "Just Compensation" For the Trespass Claims of Arctic Slope Eskimos

Recognizing that courts would hold the United States liable for a taking of the trespass claims of Arctic Slope Eskimos, the State of Alaska has argued that benefits given to the Eskimos by the Settlement Act would satisfy judicial requirements of "just compensation" for the extinguishment of those claims by § 15 of S. 1824. This argument would not satisfy judicial standards under the Fifth Amendment in four important respects.

First, as shown in Part III infra, Congress, when enacting the Settlement Act, did not intend to extinguish any rights which were protected by the Fifth Amendment. Believing that Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), did not require the payment of any compensation for the extinguishment of aboriginal title in Alaska, Congress viewed the monetary payments and land conveyances mandated by the Settlement Act as satisfying only the moral and political obligations of the United States to Alaska Natives. Certainly, there is no express declaration anywhere in the Settlement Act or its legislative history that Congress intended to take Fifth Amendment property or to provide compensation for such a taking.

Accordingly, Section 4(c) of the Settlement Act cannot be construed as extinguishing any Fifth Amendment rights. That construction must follow from the legislative history of the Act and from the constitutional rule that destruction of property rights by implication or ambiguity is not favored and will not be allowed by a court unless the implication is so clear as to be equivalent to an express declaration. Osbourne v. Nicholson, 80 U.S. (13 Wall) 654 (1872). The Settlement Act did not provide "just compensation" for the extinguishment of the trespass claims of Arctic Slope Eskimos for the simple reason that neither its language or legislative history are sufficiently clear to effect a taking to which its "settlement" could be applied.

Second, if, in 1975, Congress attempts to extinguish the trespass claims of Arctic Slope Eskimos by enacting § 15 of S. 1824 on the theory that a "settlement" in 1971 provided "just compensation," such legislation would be unconstitutional under the requirement that there be "reasonable, certain and adequate provision for obtaining compensation" at the time of the taking. Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890), quoted with approval in Regional Rail Reorganization Act Cases, 419 U.S. 102 42 L. Ed. 2d 320, 343 (1974).

The likelihood that Arctic Slope Eskimos could obtain compensation from the Settlement Act for a taking of their trespass claims would be anything but "reasonable" or "certain." The disposition of funds and lands under that Act is governed by an intricate statutory scheme. The suggestion that a court would be willing to upset this statutory framework to satisfy the tort claims of a particular Native group defies rational belief. Absent specific legislation by Congress authorizing a redistribution of Settlement Act benefits and, in effect, enacting a new Settlement Act, it is inconceivable that any court would order diversion of Settlement Act funds to satisfy the trespass claims of Arctic Slope Eskimos.

Third, neither Congress nor the courts can withdraw the benefits of the Settlement Act from Alaska Natives for the

purpose of redistributing those benefits to others even where the new beneficiaries are a sub-group of the former. With passage of the Act, the funds and lands distributed by it became vested property rights in the recipient corporations, villages, and individuals. The United States can no more interfere with these Fifth Amendment property rights than it can the trespass claims of Arctic Slope Eskimos. Once given, even gifts become protected property. The suggestion that the United States can use the property of others to satisfy its own obligation to provide "just compensation" strains credibility to the breaking point. Extinguishment of trespass claims in 1975 would create a new obligation of the United States to pay just compensation. Past gifts or even past consideration cannot be used to satisfy that new debt.

Finally, even if the benefits of the Settlement Act to Arctic Slope Eskimos could be deemed to be a source of "just compensation" for takings of trespass claims in 1971 or 1975, those benefits would not be the "full monetary equivalent of the property taken." United States v. Reynolds, 397 U.S. 14, 15-16 (1970). Under the Settlement Act, Arctic Slope Eskimos received five million acres of land and the right to receive cash payments of approximately 48 million dollars.

Because land selections of the Arctic Slope Regional Corporation (ASRC) and its eight associated villages were, in important respects, such as mineral rights, confined to areas

outside Naval Petroleum Reserve No. 4, the Arctic National Wildlife Range, and previous land selections by the State of Alaska in Prudhoe Bay, the lands Arctic Slope Eskimos will receive under the Act have no known value. Moreover, seventy per cent of any proceeds from the subsurface estate of the lands ASRC selects must be shared with other Alaska Natives pursuant to Section 7(i) of the Act. Thus, as "just compensation" for trespass claims of major magnitude, the lands given to ASRC under the Settlement Act are not "adequate" and since the ultimate value of those lands is wholly indefinite, they cannot satisfy the constitutional requirement of certainty of compensation.

Monetary payments to be received by Arctic Slope Eskimos under the Settlement Act will not constitute adequate compensation for the taking of their trespass claims. On December 18, 1971, the value of the monetary payments promised to the Arctic Slope was approximately 22 million dollars based on a discount rate of 10%. By contrast, spokesmen for the State of Alaska and the oil industry have represented to Congress that their exposure to suits under the Edwardsen stipulations may literally exceed a billion dollars. Although that figure appears to be excessive, it is clear that those claims are worth far more than the 22 million dollars (or approximately \$5500 per Eskimo) that the Arctic Slope received for Prudhoe Bay. Thus, even if the United States could somehow constitu-

tionally and morally take back its settlement with Arctic Slope Eskimos so as to give them nothing for the taking of some of the most valuable property in the world, that settlement would not be adequate compensation for the extinguishment of their trespass claims.

The suggestion that Settlement Act benefits should be applied by the courts as "just compensation" for the taking of the trespass claims of Arctic Slope Eskimos is dangerous. It is dangerous because it erroneously suggests that the Edwardson problem can be taken care of "on the cheap," that the United States Treasury won't really be called upon to satisfy the enormous liabilities incurred by oil companies in the rush for Prudhoe Bay. It is dangerous because it invites dismembering of the Settlement Act in an effort to make it serve a purpose which its sponsors never intended. Most importantly, it is dangerous because it invites America to unilaterally alter its settlement with Alaska Natives, to make the last chapter of this Nation's history with American Indians "just another broken treaty."

III. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT OF DECEMBER 18, 1971, DID NOT EXTINGUISH TRESPASS CLAIMS OF ARCTIC SLOPE ESKIMOS

Proponents of § 15 of S 1824 have argued at great length to this Committee that § 4(c) of the Settlement Act extinguished, and was intended to extinguish, accrued trespass claims of Arctic Slope Eskimos. See, e.g., Extinguishment Amendment Hearings, part 2, at 110-148. That construction of § 4(c) is not supported by its language, its legislative history or any persuasive analysis of the type of claims Congress intended to extinguish on December 18, 1971.

A. The Congressional Purpose in Providing for a Legislative Settlement of Alaska Native Land Claims Was to Remove the Cloud on Title to Alaska Lands.

Although the land claims of Alaska Natives based on aboriginal use and occupancy have been the subject of several acts of Congress, including inter alia, the Organic Act of May 17, 1884, 23 Stat. 24 (Sec. 8), and the Alaska Statehood Act of July 7, 1958, 72 Stat. 339 (Sec. 4), it was not until the 1960's, when the State of Alaska began to make land selections under the Statehood Act, that the conflict between State and Native claims to land in Alaska became serious. An informal land freeze was instituted by Secretary of the Interior Udall in late 1966, and later formalized. P.L.O. No. 4582, (January 17, 1969). The issuance of mineral leases on federal lands and approvals and tentative approvals of state selections were suspended pending congressional determination of Native land rights.

The land freeze made a congressional settlement of land claims virtually mandatory. The only other alternative was extensive litigation over the title to lands in Alaska, which had already begun in State of Alaska v. Udall, 420 F. 2d 938 (9th Cir. 1969), and in which the court's ruling had the effect of barring further approval of state selections pending a determination of Native aboriginal land rights.

In the report accompanying S.35, the Senate Interior Committee's version of the Settlement Act, the problems raised by the Natives' outstanding and unextinguished aboriginal land claims were described as follows:

As a result: (1) there is doubt about the authority of the Department of the Interior to grant to the State or other parties rights in, or patent to, public lands in Alaska claimed by Natives; consequently, almost all mineral leasing on the state selection of such lands have been brought to a halt; (2) the title to public lands or other property in Alaska transferred to the State or to private persons in the fact of a Native protest is seriously compromised; yet (3) Congress to date has granted no agency or court the jurisdiction to make a determination on their merits concerning Native claims in Alaska.

S. Rep. No. 92-405, 92d Cong., 1st Sess. 76 (1971) (emphasis added).

Later in the same report, the Settlement Act's congressional purpose as contained in § 2 of the Senate bill was explained as follows:

. . . Congress finds that there is an immediate need for a fair, just, and final settlement of all Alaskan Native land claims; that these land claims constitute a legal (but judicially undetermined) cloud on the title to virtually all lands in Alaska; that the best interests of the Native people of Alaska, State of Alaska and the United States are served by a prompt and final legislative settlement; and that the effectuation of such a settlement is the purpose of the Act.

Id. at 108 (emphasis added). Although the "declaration of policy" section of the Settlement Act as finally enacted does not contain the emphasized language, the conference report makes it clear that "[t]he substance of the conference report language is the same as section 2 of the Senate Amendment." H. Rep. No. 92-746, 92d Cong., 1st Sess. 40 (1971).

That Congress saw the Settlement Act solely in terms of removing the cloud on title to virtually all the public lands of Alaska subject to Native claims is evidenced by the limiting effect of the extinguishment clause to challenges to land. By way of explaining the effect of § 4 of the Settlement Act, the conferees stated that

It is the clear and direct intent of the conference committee to extinguish all aboriginal claims and all aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska.

Id. (italics in original; emphasis added).

B. Congress Did Not Intend to Extinguish Property Rights Protected by the Fifth Amendment.

As demonstrated earlier in Part II supra, the accrued trespass claims of Arctic Slope Eskimos are property which cannot be extinguished without payment of compensation by the United States.

Nowhere in the entire legislative history of the Settlement Act is there any suggestion that Congress intended to provide compensation in it for the extinguishment of constitutionally protected rights. Throughout the Act's legislative history, it is clear that Congress intended to deal only with aboriginal title which it understood to be not compensable under the Fifth Amendment. See, e.g., discussion of impact of Tee-Hit-Ton Indians v. United States, supra, on Native rights in S. Rep. No. 92-405 at 86.

The clearest expression of what Congress saw its role to be in settling Alaska Native land claims is contained in Chairman Aspinall's opening statement during the May 1971 House hearings:

[T]here should be no misunderstanding about the fact that Congress has sole power and responsibility for determining what is fair compensation for the extinguishment of aboriginal title. Congress is not bound by prior statutes or by judicial decisions. It is settled law that aboriginal title is not compensable under the due process clause of the Fifth Amendment, and that Congress can extinguish an aboriginal title without paying anything if it wishes to do so. The congressional policy to pay for aboriginal titles is just that -- a policy. When applying that policy, Congress is the sole judge of adequacy of the payment.

Hearings on H.R. 3100, H.R. 7039, and H.R. 7432 before the Subcomm. on Indian Affairs of the House Common Interior and Insular Affairs, 92d Cong., 1st Sess. 65 (1971).

Congress, in Mr. Aspinall's view, was legislating not on constitutionally protected rights of Alaska Natives, but only with respect to their aboriginal title. Although Congress, consistent with Tee-Hit-Ton, could have extinguished aboriginal title without the payment of compensation, Congressman Aspinall also recognized the longstanding congressional policy not to extinguish aboriginal title without the payment of compensation. As he pointed out,

[T]he United States is the only country in the world that pays for the extinguishment of aboriginal titles.

[T]he amount of land to be granted, and the amount of money to be paid, will be based upon Congress' evaluation of Native needs, the role of the Natives in the present day affairs of the State, and the impact of the grant to the Natives on the economy of the State. The amount of the grant to the Natives should not be equated to the undetermined value of undetermined land and water areas, to which the Natives might be able to prove aboriginal title.

Id., at 66.

As the Chairman of the House committee responsible for the drafting of the Settlement Act and the House-Senate Conference Committee on the Act, Chairman Aspinall's view of its purpose is entitled to great weight. His views on this point are wholly consistent with the Eskimos' position that Congress in the Settlement Act did not intend to extinguish Fifth Amendment property rights.

It is also clear that Congress did not attempt to determine the question of compensation under the same standards a court would have employed if constitutionally protected rights had been involved. In justifying the \$925 million provided as the cash component of its settlement bill, the House Committee said;

The \$925,000,000 figure is an arbitrary one. It is not intended to be related to the value of the land claimed by the Natives under the doctrine of aboriginal title.

. . . . The figure chosen by the Committee . . . is based on the following considerations: the extreme poverty and underprivileged status of the Natives generally, and the need for adequate resources to permit the Natives to help themselves economically.

H. Rep. 92-523, at 5-6.

Not only were the cash grants made to the Natives under the Settlement Act "arbitrary," but the allocation formula which Congress used demonstrates that no effort was made to place a value on the aboriginal titles of each regional group of Alaska Natives. All Native groups -- Indians, Eskimos and Aleuts -- were treated alike without regard to the extreme differences in value of the lands taken from them. Cash distributions under the Settlement Act are on a per capita basis, i.e. tied to the number of Native enrolled in each region. By failing to undertake a valuation of the claims involved and by using a per capita formula for distributing the cash payments under the Act, Congress was undeniably engaged in a political settlement of the Native aboriginal claims which could not --

and did not -- obviate constitutionally protected rights. Congress made no attempt to provide the "just compensation" to Arctic Slope Eskimos required by the Fifth Amendment. The fairness of the Settlement Act could be the subject of endless debate; that constitutionally protected claims were outside its purview is beyond doubt.

As the State of Alaska has conceded:

We believe that the Congress could not and did not intend -- simply because it could not do it -- reach constitutionally protected rights of action.

Extinguishment Amendment Hearings, Part 1, at 75.

A written statement, submitted to this Committee by Senator Stevens in conjunction with his oral testimony, also lends considerable credence to the fact that Congress did not intend, by its passage of the Settlement Act in 1971, to extinguish claims protected by the Fifth Amendment. He noted that "there would be no extinguishment of rights in those cases where there was a disturbance of physical possession by one acting without color of law," Id. at 39, and then stated:

I wish to make absolutely clear that neither the Settlement Act itself nor any amendment which I would support would affect in any way the rights of an Alaskan Native or any other citizen to recover for actual damages where he suffered a personal tort or his physical possession of a parcel of land was improperly disturbed. Our focus in 1971 was, very properly, on claims that were based on alleged aboriginal title; any claims based on that title or the like were extinguished. But one need not have a claim of title to recover damages for personal injuries or for interference with any actual, substantial and continuous occupancy of land. If

anyone destroyed a Native's dwelling or farm land, or was guilty of a personal tort, the claim of that Native is totally unaffected by the Settlement Act. No one would deny his right to recover his actual damages, regardless of whether he was Native or not.

Id. at 40. As shown in Part IV (A) infra, the rights of American Indians to protection of their right of quiet enjoyment to lands held under aboriginal title is exactly the same as the right of all American citizens to quiet enjoyment of their dwellings, farm lands and other property rights. American Indians, and all American citizens, are entitled to seek judicial relief from the courts for all interferences with these rights. The right to seek such relief -- a cause of action -- is property protected by the Fifth Amendment whether the interference is with aboriginal possessory rights or with the right of possession to patented farm land. Accordingly, if the Settlement Act did not, and was not intended to, extinguish the latter, as Senator Stevens contends, it did not, and was not intended to, extinguish the former. If a trespass claim for "disturbance of physical possession" survived the Settlement Act, so did trespass claims for disturbance of aboriginal possession. The Fifth Amendment does not discriminate.

C. The Language and Legislative History of Section 4(c) Expressly Preserve Tort Claims of Alaska Natives and Provide No Persuasive Support For the Proposition that the Act Extinguished Accrued Trespass Claims.

Any analysis of what Congress intended to accomplish through the extinguishment provisions of the Settlement Act must begin with the statutory language of § 4:

(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

In its memoranda submitted to this Committee, Extinguishment Amendment Hearings, Part 2, at 112-15, the State of Alaska engages in an analysis of § 4 that strains to create a logical framework for extinguishing the trespass claims of Arctic Slope Eskimos. That analysis begins with § 4(b) and works outward to § 4(a) and (c) to find Congressional intent.

It is clear that § 4(b) extinguishes, as of December 18, 1971, "all aboriginal titles . . . and . . . claims of aboriginal title." What then, did Congress accomplish by including §§(a) and (c) in the extinguishment clause?

Subsection 4(a) provides that "prior" conveyances of interests in public lands of Alaska, including tentative approvals under the Statehood Act, "shall be regarded as an extinguishment of the aboriginal title thereto, if any." The State of Alaska asserts that 4(a), by validating the tentative approvals and conveyances issued prior to December 18, 1971, also extinguished aboriginal titles to the affected lands on the dates those approvals and conveyances were issued. Thus the State asserts that § 4(a) did extinguish a large class of the Native trespass claims, presumably those for trespasses occurring on lands selected by and tentatively approved to the State of Alaska prior to the Settlement Act.

However, as shown in Part IV (C) infra, § 4(a)'s ratification of prior conveyances and tentative approvals could not extinguish the Native's aboriginal title. In the absence of express language to the contrary, a conveyance of the United States' fee interest in lands does not extinguish Indian possessory rights. See, e.g. United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 347 (1941); Buttz v. Northern Pacific R.R. Co., 110 U.S. 55, 30 L. Ed. 330, 334 (1886).

Thus, what § 4(a) accomplished was not extinguishment of aboriginal title, but instead validation of leases among various oil companies and confirmation of the State's title to the lands it had selected. Without such validating action those lands would have remained in the public domain, possibly

available for selection by Alaska Natives under the Settlement Act. See Edwardsen v. Morton, 369 F Supp. 1359, 1377-78 (D.D.C. 1973). Section 4(a), consistent with the purpose of the Settlement Act, removed the clouds on the State's title to tentatively approved lands and the oil companies' leases. It did not extinguish aboriginal title and therefore had no effect on Eskimo trespass claims.

The overriding purposes of § 4(c), by its terms, was to extinguish claims for compensation for the taking of aboriginal title. Stated differently, while § 4(a) validated state tentative approval and federal conveyances and § 4(b) extinguished the underlying aboriginal title of Alaska Natives, the purpose of § 4(c) was to preclude any pending or future claims against the United States, the State of Alaska, or third parties arising out of the taking or loss of aboriginal title.

As set forth above, the State's statutory analysis of § 4 presents no persuasive support for their assertion that "all claims" in § 4(c) "obviously" included claims for trespass to aboriginal land as well as claims for the taking of aboriginal land. In fact, "all claims" means aboriginal claims for "land", "hunting", "fishing" and "water." See Extinguishment Amendment Hearings, Part 1, at 99-101.

Moreover, contrary to the State's argument, tort claims were expressly preserved by § 4(c). This reading of § 4(c) is supported by the language of the report accompanying S.35, as sent from committee to the Senate floor:

Section 4 declares the terms of the settlement set forth in this Act, describes the claims which are extinguished or preserved by the Act and sets up procedures for a report by the Secretary of the Interior on the future management and operation of Federal programs in Alaska primarily designed to benefit Alaska Native people.

Section 4(a)

Subsection 4(a) declares that the provisions of this Act constitute a full and final extinguishment of any and all claims based upon aboriginal right, title, use or occupancy of land in Alaska. The language specifically includes submerged lands and any aboriginal hunting and fishing rights. The extinguishment [sic] is final and effective not only for claims against the United States but also for any claims against the State of Alaska and all other persons. Remaining in effect and unextinguished by this Act are all claims which are based upon grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits for an accounting for funds belonging to Natives or Native groups in the custody of the United States, for tort or breach of contract, and for violations of the fair and honorable dealings clause of the Indian Claims Commission Act. Specifically included, and dismissed and extinguished under the terms of this Act, are all claims pending before the Indians Claims Commission and any court, Federal or State, which are based upon a claim of aboriginal right, title, use or occupancy . . .

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, including lands tentatively approved to the State shall, pursuant to this section, be regarded as a full and final extinguishment of any and all Native claims thereto.

S. Rep. No. 92-405, at 110 (emphasis added). This language, part of a section-by-section analysis of S.35, makes it clear that it was the intent of the framers of the extinguishment clause of S.35 (which, denominated as § 4(a) in the Senate bill, was very similar to 4(c) as it was finally adopted by the House-Senate conferees) to specifically exclude tort claims, such as those for trespass, from extinguishment.

The State of Alaska asserts that the emphasized passage represents an unchanged explanation of an earlier version of the Senate bill's extinguishment clause and is therefore of dubious value. This argument must also fall when relevant bill and report language as they developed during the Senate committee's consideration are subjected to more critical analysis.

As introduced by Senator Jackson early in the 92nd Congress, the extinguishment clause of S.35 provided as follows:

The provisions of this Act shall constitute a full and final settlement and extinguishment of any and all claims against the United States, the State, and all other persons which are based upon aboriginal right, title, use, or occupancy of land in Alaska (including submerged land underneath all water areas, both inland and off shore, and including any aboriginal hunting or fishing right that may exist) by any Native, Native Village, or Native group or claims arising under the Act of May 17, 1884 (23 Stat. 24), or the Act of June 6, 1900 (31 Stat. 32]), or any other statute or treaty of the United States relating to Native use or occupancy of land, including all land claims (but not claims based on

grounds other than loss of original Indian title land) pending before any court or the Indian Claims Commission on the effective date of this Act.

(Emphasis added).

The extinguishment clause remained in this form in committee prints through early October 1971. Although the Edwardsen suit was filed on October 5, more significantly the House Committee had by that time reported out its version of the settlement legislation. The House committee bill, H.R. 10367, made provision for extinguishment in § 4:

(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All alleged aboriginal title and claims of aboriginal title in Alaska based on use and occupancy, including any alleged aboriginal hunting and fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on alleged aboriginal right, title, use or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Alaskan Native use and occupancy, including any such claims that are pending before any court or the Indian Claims Commission, are hereby extinguished.

When the Senate bill was reported out of committee on October 21, it was closer in form to the House version. As reported, § 4(a) of S.35 had been changed to delete the bracketed words and to add the underscored words:

The provisions of this Act shall constitute a full and final settlement and extinguishment of any and all claims against the United States, the State and all other persons which are based upon aboriginal right, title, use, or occupancy of land in Alaska (including submerged land underneath all water areas,

both inland and off shore, and including any aboriginal hunting or fishing rights that may exist) by an Native, Native Village, or Native group or claims arising under the Act of May 17, 1884 (23 Stat. 24), or the Act of June 6, 1900 (31 Stat. 321), or any other statute or treaty of the United States relating to Native use or occupancy of land, including all [land] claims [(but not claims based on grounds other than loss of original Indian title land)] based upon aboriginal right, title, use or occupancy pending before any court or the Indian Claims Commission on the effective date of this Act. All prior conveyances of public land and water areas in Alaska, or any interests therein, pursuant to Federal law, including tentative approvals pursuant to section 6(g) of the Alaska Statehood act, shall be regarded as an extinguishment of any and all Native claims thereto.

Notwithstanding the changes made in the revised version, the Committee report retained the following language in its description of the claims extinguished or preserved:

Remaining in effect and unextinguished by this Act are all claims which are based upon grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits for an accounting for funds belonging to Natives or Native groups in the custody of the United States, for tort or breach of contract, and for violations of the fair and honorable dealing clause of the Indian Claims Commission Act.

S. Rep. No. 92-405 at 110 (emphasis added).

The State of Alaska argues that the foregoing statement is of little consequence because the paragraph in the report is identical to that contained in the 1970 Senate report describing the extinguishment clause before it was revised. In the haste of completing its massive report, it is contended the

draftsman overlooked the language change in § 4(a). There are two reasons why this is not persuasive in diminishing the significance of the report language on the question of intent. First, it should be noted that the other late change made in § 4(a) of S.35, i.e., the additional provision for validating prior conveyances and State tentative approvals, was explained in the Senate report. If the Senate committee intended to attach any importance to the deletion of the word "land" before "claims" and the elimination of the proviso for claims other than those based on loss of aboriginal title, why did the committee not take the same opportunity to revise the report language as it did in adding a new paragraph in the report referring to the validation of prior conveyances and tentative approvals?

Second, the language changed to conform the Senate bill's extinguishment clause more closely to that of the House committee is not inconsistent with the preservation of claims based upon grounds other than the taking or loss of aboriginal title. By their terms, there is nothing in § 4 of S.35, § 4 of H.R. 10367, or § 4 as it emerged from the conference committee that would preclude the continued existence and maintenance of claims, such as the accrued trespass claims of Arctic Slope Eskimos, that are based on grounds other than the taking or loss of aboriginal title. The Senate report language explaining the intent of the Senate on the question of the scope of the extinguishment clause is entitled to great weight for in describing § 4 in their report, the House-Senate conferees

declared "[t]he conference report language is, in substance, the same as the language of the Senate amendment." H. Rep. No. 92-746 at 40.

Attempting to support their assertions that § 4(c) was intended to extinguish accrued trespass claims, Senator Stevens and the State of Alaska dwell at length upon the fact that Edwardsen v. Morton was pending prior to enactment of the Settlement Act, and most critically, was filed before the late-October 1971 change in the Senate bill's extinguishment clause. The Edwardsen case, however, was clearly perceived by all as a challenge to Alaska's title to lands on the Arctic Slope:

In addition, litigation has in recent weeks been initiated by the Arctic North Slope Native Association against the State of Alaska over the title to Prudhoe Bay.

S. Rep. No. 92-405 at 98 (emphasis added).

Even the leading proponent of the oil industry's position, a representative of the Western Gas and Oil Association, who suggested an amendment in committee to § 4(a) of S.35 which would have expressly named the Edwardsen case as being subject to the extinguishment clause, viewed the case solely as a challenge to the State's land title. In an explanation submitted with the suggested amendatory language, the Edwardsen suit was described as:

requesting that (a) all tentative approvals granted by the Secretary of the Interior to land selected by the State on the Arctic Slope be canceled, (b) that the Secretary be enjoined from granting any further tentative approvals, and (c) that an accounting be made to the [Arctic Slope Native] Association.

This explanation also asserted that § 4(a), as then drafted, was ambiguous as to whether the Edwardsen suit -- even as a challenge to title -- would be extinguished. It argued that the suggested amendment was necessary to remove the "cloud it [Edwardsen] poses for tentatively approved State selections."

This deficiency in Alaska's title was what Congress wished to remove. Section 4 of the Settlement Act was designed to extinguish all claims representing a challenge to title including those then viewed by Congress as being asserted in Edwardsen. Trespass claims were not considered.

In summary, Congress enacted the Settlement Act to remove a cloud on Alaska land title. Congress did not intend to extinguish vested property rights. It expressly preserved tort claims of Alaska Natives. It never considered trespass claims.

On the basis of a fair reading of the language, purpose and legislative history of § 4, Congress did not intend to extinguish accrued trespass claims of Arctic Slope Eskimos.

IV. ARGUMENTS BY THE STATE OF ALASKA THAT THE FIFTH AMENDMENT DOES NOT APPLY TO THE PROPERTY RIGHTS OF INDIANS HAVE NO BASIS IN AMERICAN LAW.

In its supplemental submission to this Committee, the State of Alaska set forth several arguments which suggested, in effect, that, while the Fifth Amendment might protect trespass claims generally, it does not protect the trespass claims of American Indians. Extinguishment Amendment Hearings, Part 2, at 71-80. None of these arguments would be upheld in a court of law.

A. The Argument That Indian Possessory Rights Are Inferior To Those of The White Man

In its supplemental memorandum the State argued that trespass claims of Arctic Slope Eskimos are not protected by the Fifth Amendment because Congress has the power to extinguish the possessory rights from which those claims arise without payment of just compensation. See Extinguishment Amendment Hearings, Part 2, at 71-74. Because the trespass claims of other American citizens are fully protected by the Fifth Amendment, Part II supra, the State's position is nothing more than a statement that the right of Indians to seek relief from American courts for third-party interference with their quiet enjoyment of their lands is less than that of whites.

If the State's argument means that Indians have fewer rights in the courts than whites, it violates fundamental

principles of equal protection. Even the tort claims of aliens who have entered the United States illegally are constitutionally protected.

One injured as a result of negligence of another has a right of action against that other to recover damages sustained by reason of such injury. That right of action is property.

.

While an alien is permitted by the Government of the United States to remain in the country, he is entitled to the protection of the laws in regard to his right of person and property. He is entitled to the benefits of the Fourteenth Amendment.

.

Congress, had it seen fit to do so, might have provided that an alien making an illegal entry into the country should be denied all civil rights, and the protection of the Fourteenth and Fifth Amendments. Congress has not so acted It is not for the court to add to these penalties by depriving him of his property. In this case the right to recover damages for the injury inflicted by defendant.

Martinez v. Fox Valley Buslines, 17 F. Supp. 576, 577 (N.D. Ill. 1936). Presumably the rights of American Indians to seek relief from the courts for torts to their property are at least as great as those of illegally-entered aliens.

If, on the other hand, the State's argument means that Indian rights of exclusive possession confer less protection against third-party interference with quiet enjoyment than do white property interests, it overlooks the very essence of the United State's guarantees to American Indian's respecting their aboriginal lands and its fiduciary duty to enforce them.

Courts have repeatedly reaffirmed the principle that the right of American Indians to the exclusive possession of their lands is entitled to the same sovereign protection as the rights of whites.

One uniform rule seems to have prevailed from [the Europeans'] first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation, not as the right of the individuals located on particular spots.

Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

. . . .

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.

. . . .

Such, too, was the view taken by this court of Indian rights in the case of Johnson v. McIntosh, (8 Wheat. 571, 604), which has received universal assent.

The merits of this case do not make it necessary to inquire whether the Indians

within the United States had any other rights of soil or jurisdiction; It is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee simple of the whites. (5 Pet. 48).

Mitchel v. United States, 34 U.S. (19 Pet.) 711, 745-46 (Marshall, C.J.; emphasis added). In 1974 the Supreme Court once again affirmed Chief Justice Marshall's declaration that Indian occupancy rights are equivalent to those of whites.

In United States v. Santa Fe Pacific R. Co. 314 US 339, 345, 86 L Ed 260, 62 S Ct 248 (1941), a unanimous Court succinctly summarized the essence of past cases in relevant respects:

"unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Cramer v. United States, 261 US 219, 227, 67 L ed 622, 625, 43 S Ct 342. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. (US) 543, 5 L ed 681, and has been repeatedly reaffirmed. Worcester v. Georgia, 6 Pet. (US) 515, 8 L ed 483; Mitchel v. United States, 9 Pet. (US) 711, 1 L ed 283; Chouteau v. Malony, 16 How. (US) 203, 14 L ed 905; Holden v. Joy, 17 Wall. (US) 211, 21 L ed 523; Buttz v. Northern P. R. Co. 119 US 55, 30 L ed 330, 7 S Ct 100 *supra*; United States v.

Shoshone Tribe, 304 US 111, 82 L ed 1213, 58 S Ct 794. As stated in *Mitchell v. United States*, supra (9 Pet. (US) 746, 9 L ed 296), the Indian "right of occupancy is considered as sacred as the fee simple of the whites."

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 668-69 (1974).

The State of Alaska's argument that Indian possessory rights are inferior to those of whites because the former are not protected by the Fifth Amendment is especially strange in view of the United States' fiduciary duty to American Indians. Since the inception of our Nation's history, the United States has acted as a trustee or guardian for the real property interests of American Indians to protect the interests against white interference or exploitation. The Supreme Court has characterized the United States' trust responsibilities as involving "moral obligations of the highest responsibility and trust." Seminole Nation v. United States, 316 U.S. 286, 297 (1942); and as binding the United States "by every moral and equitable consideration to discharge its trust with with good faith and fairness." United States v. Payne, 264 U.S. 446, 448 (1924). The United States' fiduciary duty requires it to take affirmative measures to prevent interference with quiet enjoyment of Indian lands or to seek compensation for such interference once it occurs. In view of this special relationship between American Indians and the United States which

guarantees not only a remedy in the courts to protect Indians' quiet enjoyment of land but also the active intervention of the federal government on their behalf, the state of Alaska's argument that Indian possessory rights are inferior to those of whites defies rational belief.

In terms of protection of property from unconsented interference, there is only one difference between Indian possessory rights and white property interests. In 1955 the Supreme Court decided that Congress may prospectively extinguish Indian possessory rights "without any legally enforceable obligation to compensate the Indians." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955). Under that decision Indians holding land under unrecognized aboriginal title do not have property rights of perpetual quiet enjoyment as against the United States because Congress may extinguish prospectively those rights at any time. As to the rest of the world, however, Indian possessory rights are property fully protected by the Constitution. Congress alone, not oil companies, federal officials or the State of Alaska, has the power of prospective extinguishment. Until such time as Congress exercises that power, those rights are protected by the United States against all intrusion by third parties, Tee-Hit-Ton, supra at 279, just like white property interests.

The failure to distinguish between the interest of Arctic Slope Eskimos in perpetual quiet enjoyment of their lands as

against the United States and the interest of Arctic Slope Eskimos in quiet enjoyment of their lands as against third parties lies at the heart of the State's erroneous "the greater includes the lesser" argument. See Extinguishment Amendment Hearings, Part 2, at 71-74. The two interests are entirely different. Under Tee-Hit-Ton the sovereign makes no guarantee of protection respecting the first but explicitly guarantees the second until such time as Congress lawfully enacts a prospective extinguishment. The assertion that Congress can extinguish trespass claims because it can extinguish aboriginal title completely overlooks this distinction and belittles the guarantee of quiet enjoyment of land given by the United States to American citizens -- whites, Indians and all others alike.

B. The Argument that Indian Possessory Rights May be Extinguished Because They are Based on Statutory Rights

The State of Alaska has also suggested to this Committee that trespass claims filed under the Edwardsen stipulations may be extinguished without offending the Fifth Amendment because that Amendment does not protect causes of action created by legislative enactment. See Extinguishment Amendment Hearings, Part 2, at 74-78. This suggestion is without merit.

Even if this rule existed, it would not apply to Indian possessory rights because those rights are not dependent on statutes.

[A] tribal right of occupancy, to be protected, need not be "based upon treaty, statute, or other formal government action."

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974) quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941). Oneida holds squarely that a claim for interference with Indian possessory rights arises under federal common law. 414 U.S. at 674.

The proposition that a tribe needs no grant of authority from the Federal Government in order to exercise its inherent power of excluding trespassers has been repeatedly affirmed by the Attorney General.

F. Cohen, Handbook of Federal Indian Law 306 (1945).

Like other common law causes of action, the trespass claims of Arctic Slope Eskimos are fully protected by the Fifth Amendment.

C. The Argument that Congress can Retroactively Ratify Trespasses to the Arctic Slope

The State's final argument that the Fifth Amendment does not apply to trespass claims of Arctic Slope Eskimos is that those claims can be extinguished through retroactive ratification because Congress could have authorized the trespasses at the time they occurred. Extinguishment Amendment Hearings, Part 2, at 78-80. This argument fails in several respects.

First, ratification assumes there is an act to ratify. For extinguishment of aboriginal title in 1975 to relate back through ratification, assuming arguendo that such ratification is constitutional, there must have been some act of a federal official which, though unauthorized by Congress, purported to extinguish the aboriginal title of Arctic Slope Eskimos. As the State of Alaska well knows, no official act of any federal officer ever attempted such an extinguishment. Section 15 of S. 1824 cannot accomplish under the guise of ratification what it can not constitutionally do directly because there is nothing to ratify.

Ratification of the acts of federal officials which purported to convey oil leases or other uses of Arctic Slope lands or of the various tentative approvals given by the Secretary of the Interior to land selections of the State of Alaska would not extinguish Eskimo trespass claims. If lawfully ratified, the legal consequence of those acts would only be to validate retroactively transfers of the United States' underlying fee interest. The Supreme Court has repeatedly held that such transfers of the United States' fee interest in public lands does not extinguish or even affect Indian possessory rights which survive the transfer and remain as an encumbrance on the fee.

The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the Act of July 2, 1864, was passed, the title of the Indian Tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the Company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it

Buttz v. Northern Pacific R.R. Co., 110 US. 55, 30 L Ed. 330, 334 (1886); accord, United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941); Beecher v. Wetherby, 95 U.S. 517 (1877). The rule is well-settled that, in the absence of express language to the contrary, a federal conveyance of public lands does not constitute an extinguishment of Indian possessory rights. Santa Fe, supra at 354-55, 359-60, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546, (1832); Beecher v. Wetherby, supra, Chouteau v. Molony, 57 U.S. (16 How.) 203, 239 (1853).

Until the Alaska Native Claims Settlement Act, became law no lease, tentative approval or other conveyance by the United States contained any express language which purported to extinguish the aboriginal title of Arctic Slope Eskimos. Ratification of those prior conveyances by Congress would not extinguish aboriginal title effective at any time prior to December 18, 1971. Even if such ratification effectively validated those conveyances, the possessory rights would remain as an encumbrance on the fee until December 18, 1971. Because the trespass claims of Arctic Slope Eskimos all relate to acts committed before that date, ratification by § 15 of S. 1824 would not affect suits under Edwardsen.

Second, because there were no acts of federal officials which Congress could now ratify which would have the effect of extinguishing trespass claims, the only other possibility would be ratification of the trespasses themselves. That cannot be done, however, because ratification occurs only in the context of a principal-agent relationship. No responsible person has ever suggested that the oil company trespassers to the Arctic Slope were acting on behalf of the United States at the time the trespasses occurred.

Third, even if ratification could somehow be effected, the result would be assumption by the United States of joint and several liability with the trespassers. Through ratification

a principal assumes liability for the otherwise unauthorized acts of an agent. Restatement (Second) of Agency §218 (1957). Until aboriginal title was extinguished on December 18, 1971, agents of the United States had no more right to commit trespass on the Arctic Slope than did the oil companies. The State's citation to United States v. Northern Paiute Nation, 490 F. 2d 954 (Ct. Cl. 1974), for the contrary proposition is wholly in error. The Court of Claims assumed in that case that any effective ratification of torts by the United States would make it directly liable to the Northern Paiutes. 490 F. 2d at 958. Thus, ratification would not serve to extinguish trespass liability but only to impose it on the United States.

Extinguishment of trespass claims by ratification is impossible because there were no acts of lawful agents of the United States which could be ratified to achieve the desired effect. Even if ratification were possible, it would not serve to extinguish trespass liability but only to shift it from the oil companies to the United States. Ratification is not a cure for the Fifth Amendment infirmities in legislation extinguishing accrued trespass claims of Arctic Slope Eskimos.

V. ARCTIC SLOPE ESKIMOS ARE NOT BARRED FROM RAISING THEIR DAMAGE CLAIMS FOR TRESPASSORY CONDUCT BY ACCEPTING BENEFITS UNDER THE SETTLEMENT ACT AND HAVE NOT RELINGUISHED THOSE CLAIMS.

The State of Alaska has suggested to this Committee that even if the trespass claims of Arctic Slope Eskimos are protected by the Fifth Amendment and are actionable, those claims may not be raised because the Eskimos have accepted the benefits of the Settlement Act or because they voluntarily relinquished those claims. Extinguishment Amendment Hearings, Part 2, at 81-87. Neither argument has merit.

A. No Acceptance of Benefits Rule Applies

The State's claim that Arctic Slope Eskimos cannot challenge the constitutionality of the Settlement Act because they have accepted its benefits wholly misapprehends the Eskimo's legal position and the opinion of the Court in Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973). Judge Gasch did not rule that § 4(c) of the Settlement Act was unconstitutional. He ruled that as a matter of statutory construction, it did not extinguish pre-Act trespass claims. 369 F. Supp. at 1379.

Arctic Slope Eskimos agree with Judge Gasch. Because Congress did not intend to extinguish their Fifth Amendment rights and § 4(c) did not extinguish them, there is no reason to challenge the constitutionality of the Act. The State's acceptance of benefits argument is a classic "red herring."

Even under the rule as it appears in the State's own cases, Arctic Slope Eskimos would not be barred from chal-

lenging the Settlement Act's constitutionality. Contrary to the State's assertion, Arctic Slope Eskimos did not support final passage of the Settlement Act. During the closing months of congressional deliberation on the Act, when it appeared to the Eskimos that, in their judgement, the legislation would not deal fairly with their land claims, Edwardsen v. Morton was filed to assert their land rights. Arctic Slope Eskimos cast the lone dissenting vote against a resolution of the Alaska Federation of Natives resolution endorsing the Act. After the Act was passed by Congress, Arctic Slope Eskimos sent a telegram to President Nixon stating at length their reasons for opposing it and urging a veto.

After the Settlement Act became law -- despite their opposition -- Arctic Slope Eskimos had no choice but to comply with its terms. The language of all of its key provisions is injunctive: "the State of Alaska shall be divided... into twelve geographic regions" [§ 7(a)], "Five incorporators within each region . . . shall select" [§ 12(a)(1)], etc. Arctic Slope Eskimos had no greater discretion to disobey these positive provisions of law than any other law of the United States. No court would even suggest that Arctic Slope Eskimos had any choice but to comply with the mandate of the Alaska Native Claims Settlement Act, particularly in view of dramatic penalty for failing to select land within the time limitations imposed by § 12.

Finally, if there were ever any question regarding acceptance of benefits, Arctic Slope Eskimos would be more than willing to agree to a rescission of the Settlement Act and a restoration of the status quo ante as of December 17, 1971.

B. Arctic Slope Eskimos have Never Relinquished Their Damage Claims for Pre-Settlement Act Trespasses.

Based on its explication of United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941), the State of Alaska has argued that claims for past trespasses are extinguished by a settlement of the question of aboriginal title. The issue of relinquishment in Santa Fe, however, was a question of fact. After a careful view of the record, Justice Douglas concluded that the Walapais request for a reservation, their perceived need for an area secure from white penetration to keep them from losing all their lands, and their acceptance of the reservation created at their request amounted in fact to a relinquishment of their claims to lands outside the reservation. 314 U.S. at 356-58.

Subsequent decisions following Santa Fe have underscored the factual basis of its holding.

Another principle of the Santa Fe opinion is that Indian settlement on a reservation should be seen as an abandonment of claims only when the specific circumstances warrant that conclusion. Santa Fe involved two reservations. The first, created by an act of Congress, was construed not to effect an extinguishment of Indian title. The rule of construction

affirmed by the Court was that "extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." 314 U.S. at 354, 62 S. Ct. at 255. In this light, the Court considered the establishment of the first reservation as merely an offer by Congress to resolve Indian land claims, which offer was never accepted by conduct or otherwise. It was only the second reservation, established by Executive Order, that led to extinguishment of aboriginal title, and the Court was careful in phrasing its conclusion to indicate that the specific facts justified this result:

Turtle Mountain Band of Chippewa Indians v. United States, 490 F. 2d 935, 946 (Ct. Cl. 1974) (emphasis added). In Turtle Mountain, itself, the Court of Claims refused to find that the creation of a reservation for the Chippewa Indians was a settlement of their overall land claims.

The Commission did find that in 1876 the Chippewa Indians in this area petitioned Congress to establish a reservation for them. But we have been shown no evidence indicating that this Executive Order reservation fulfilled the Indians' request or that the reservation was ever "accepted" by the Chippewas as a settlement of their land claims.

490 F. 2d at 947

As the State of Alaska well knows, Arctic Slope Eskimos never agreed to the Settlement Act as a settlement of their trespass claims. No member of Congress, prior to the passage of the Settlement Act ever stated that it had been accepted by Arctic Slope Eskimos as a settlement of their trespass claims or was so intended by Congress itself. Relinquishment is a question of fact. There are no facts to show that Arctic Slope Eskimos have ever relinquished their trespass claims--in exchange for enactment of the Settlement Act or otherwise.

STATE OF ALASKA,
JAY S. HAMMOND, GOVERNOR,
Juneau, Alaska, September 22, 1975.

Hon. HENRY M. JACKSON,
*Chairman, Committee on Interior and Insular Affairs, U.S. Senate,
Washington, D.C.*

DEAR MR. CHAIRMAN: Governor Hammond has directed me, in consultation with Attorney General Gross, to respond to your letter of September 11 and to the six alternatives presented in your letter. I will address them in the order presented in your letter.

1. NO ACTION WHATSOEVER BY THE CONGRESS

No action is unthinkable. The adverse effects on the State's social, economic, and political fabric threatened by *Edwardsen*-based lawsuits are simply too great for any polity to endure. The acrimony and social discord which are certain to arise from the filing and prosecution of the first suit against the State and over 100 private parties suffice to all but compel legislative action. Congress adopted the Settlement Act, and if—as is claimed—it left a ruinous loophole in the Act, then Congress should amend it.

Left uncorrected, the *Edwardsen* decision holds, in effect, that all the Settlement Act settled was present and future title to lands in Alaska. All the claims which may have arisen in the past for entries on lands subject to claims of aboriginal title may still be prosecuted. Prosecuting them will involve, among others, first, proof of aboriginal title, second, proof of trespass, and third, proof (and measure) of damages. The vexatious and protracted litigation which the Settlement Act sought to avoid, will now proceed. On September 19, the government advised the *Edwardsen* court that it would in a short time bring suit on a multiplicity of claims against this State and 150 private parties. Thus, "no action" is not merely unthinkable; timely action is imperative.

The first suit is against the State and 150 private parties. Various cross-claims will be filed between the defendants and others will surely be joined. At the same time, many defendants will move to have their cases tried separately to avoid association with other defendants. Just resolving the various motions to join on the one hand and sever on the other could take months of briefing and argument. The State will be sued in its capacity as an actual trespasser, e.g., to build airports and roads, and as authorizing trespasses, e.g., as lessor and permitter. Because the State was a trespasser in either capacity only as a grantee of the United States pursuant to the land grants made by Congress in the Statehood Act or under other authorizations made pursuant to federal law, it will, of course, have to join the United States to protect itself. (At this point, the United States would be both plaintiff and defendant and be faced with an irreconcilable conflict.) As the ultimate authorizing entity with respect to the trespass claims, the United States is ultimately responsible. The United States may have a defense, but unless and until that issue is settled in its favor, it will necessarily, even though not originally named, but a defendant in the forthcoming litigation and may ultimately be liable.

And of course, the litigation almost compels Natives in the other regions of Alaska to bring similar suits. Some 90 percent of Alaska was subject to claims of aboriginal title. The Natives in the other regions can ill-afford to let their claims go untested while the statute of limitations runs. The Department of the Interior reports that such suits, while not yet filed, are being contemplated, and we have received other reports that they are being prepared. "No legislative action" would leave everyone in the undesirable situation—complex and protracted litigation involving Alaska, Alaska's Natives, Alaska's non-Natives, and the United States—which the Settlement Act was intended to avoid.

The costs of the litigation in lost manpower to the federal government, the state government and the private parties would be incalculable. The Attorney General of Alaska advises that his existing staff simply could not handle that much additional work. New positions would have to be funded. My own department would bear the brunt of the fact-finding work, and would require new positions as well. Additionally, the experienced personnel from both departments who are familiar with *Edwardsen* and the claims and who now handle many and varied matters of high-level significance would be required to spend nearly full time on the trespass litigation. The situation would be the same for all parties and for the Native corporations. Who knows how many matters of significance within the Bureaus of Indian Affairs and Land Management, the Department of the Interior Solicitor's Office, and the United States Attorney's Office are going untended because of *Edwardsen*? The Department of the Interior's reply to this Committee reports that it is strained by pre-trial preparation. Literally millions of dollars in public and private manpower would go into the preparation, trials, and appeals of the litigation. Literally thousands of opportunities to do productive work will be irreparably lost, for an opportunity foregone is an opportunity lost. This diversion of manpower can be ill-afforded, especially during a period of tremendous activity in Alaska which was to have been a time of planned progress under the Settlement Act.

Direct costs of litigation may turn out to be a relatively small part of the problem. The pending litigation may, and likely will, have serious effects upon the people and firms who explored and initiated the development of the North Slope and whose experience, equipment, and special skills must be relied upon to further that development and the exploration and development of other geographic regions in the North. These will be the defendants, either directly or by joinder, in the pending litigation. The major oil companies and their prime contractors number only a handful. There are more than a hundred other defendants and many are small businesses which constitute the backbone of Alaska's local economy. The pending litigation will adversely affect their financial ability to carry on their activities. Some will face claims for ruinous damages. Their suppliers may refuse to do business on credit. Banks may refuse credit. It will be difficult for anyone to enter into long-term contracts with them in the face of the litigation. The litigation may not have this effect upon the major oil companies and their prime contractors, but their contractors and subcontractors, the ones that do the actual support work, will not be so fortunate.

Litigation arising from *Edwardsen* in other regions will have similar effects upon the fishing, mining, timber, and agricultural industries. Here we are dealing with few, if any, companies which would not suffer crippling effects from such litigation. No salmon processor, for instance, could ever pay the damages which may be claimed with respect to that resource.

We would, of course, seek to have the litigation dismissed or move for a partial summary judgment as to all trespass claims based on aboriginal title. We would hope and expect to prevail. But counsel for the *Edwardsen* plaintiffs hopes and expects that we would not prevail, and he has one judgment in his favor. Even if we did prevail, an appeal would follow and the litigation continue. Remands are always a possibility, as are subsequent appeals. Even a quick dismissal or summary judgment in the trial court affords no immediate relief from the discord and vexations which would be created by the litigation.

It is, of course, most unfortunate that the *Edwardsen* court should so clearly misread the Congress's intent to extinguish all claims based on aboriginal title. No one who was here in December 1971 had any doubts about it. All claims means, and was intended to mean, just that. Now Congress is faced with a decision by the court that it did not intend to extinguish trespass claims based on aboriginal title and is also faced with the certainty of protracted, vexatious, complex and socially and economically disruptive litigation of those claims unless it acts, and acts now, to make its intent absolutely clear. We cannot understand why Congress should hesitate for a moment to make its intent clear and give effect to the Settlement Act's purpose.

2. RETROACTIVE EXPRESSION OF CONGRESSIONAL INTENT IN APPROPRIATE LEGISLATIVE FORM

The *Edwardsen* decision rests entirely on the court's choosing to avoid a putative constitutional issue by inferring a Congressional intent wholly at odds with the purpose of the Act, with the legislative history of the extinguishment provisions, and with the actual intent of Congress. But the court did so by improperly applying a sound judicial principle: never rule on the constitutionality of a statute if it can reasonably be interpreted to avoid the issue. In our view, the Act cannot reasonably be interpreted in that manner, and clarification of Congress's intent will compel the court to decide the issue and will eliminate the basis of the litigation which is now being prepared and which will be brought in a short time against the State and 150 private parties. If Congress extinguished the trespass claims, they may not be brought against anyone. The only question then is whether they were compensable, and if so, whether there was compensation. Clearly they are not, but even if they were, there can be no question of compensation. The Settlement Act was uniquely generous in that regard.

Given the Judicial recognition of Congress's authority to express its intent on prior legislation and the great judicial respect which uniformly applies to such expressions of intent, Congress very definitely should do so, and the method proposed in section 15 of S. 1824 is an appropriate legislative form for doing so.

We would suggest, at this point, that the remainder of section 15 should also be adopted in order to achieve a resolution of the problems raised by *Edwardsen* in a manner that will remove all uncertainty.

3. CONGRESSIONAL ACTION TO ESTABLISH A PROCEDURE FOR, AND MANDATE EXPEDITED JUDICIAL REVIEW OF, THE OPINION OF THE COURT IN THE EDWARDSSEN CASE

Expedited review without a new expression of Congressional intent presents the appellate courts with the same problem the *Edwardsen* court faced and with the same judicial doctrine: when in doubt, avoid the constitutional issue. If the appellate courts follow that rule, we are back where we started. The upshot is that the alleged ambiguity of the extinguishment provisions, their failure to include "trespass" expressly, and the reluctance of at least one court to rule on putative constitutional issues when they can be avoided is frustrating what Congress set about to do, that is, settle all the claims and eliminate the need for complex, disruptive, and protracted litigation. For expedited review to be of any usefulness there must be a clarification of Congress's intent.

Additionally, any jurisdictional legislation would require a stay—or suspension of jurisdiction—in the pending litigation and an order to the United States Attorney to pursue the appeal. Congress's power over the jurisdiction of the federal courts may be broad enough to effective the first, but the separation of powers doctrine creates doubts as to the second. The handling of the government's litigation before the courts is vested in the executive. So far, the Justice Department chooses not to appeal. Congress's direction may well, and probably would, be followed.

Uncertainty would nevertheless exist. There is a stipulation by counsel in a pending suit for the government to bring litigation against alleged trespassers. It was approved by the court in consideration of a motion before the court to compel such action. It is not at all certain that Congress's powers extend so far as to interfere at such a stage in the proceedings or that the United States Attorney would be free to follow Congress's directions. He is now under a duty to bring suit.

We do not think that expedited review would be of much help in solving the problems created by *Edwardsen* unless the Act providing for it includes a clarification of intent or at least a disclaimer of the *Edwardsen* holding.

4. CREATION OF AN ADMINISTRATIVE ENTITY, SIMILAR TO THE PUEBLO INDIAN LANDS BOARD, TO RESOLVE THE NATIVE CLAIMS INVOLVED

The very language of this alternative suggests its futility. It is now 1975 and we are still trying to "resolve Native claims." Referring the *Edwardsen* problems to an administrative board suggests many more years of the same. Everyone understood that all the Native claims were extinguished by the Settlement Act. If Congress creates a board to resolve Native trespass claims, it will be implying that it did not extinguish them.

At any event, as the Library of Congress indicated in raising this alternative, it would only serve to delay resolution of the *Edwardsen* problems. The State and its 150 potential co-defendants have a right to a jury trial on the merits. An Administrative proceeding merely prolongs the proceedings, prolongs the disruption and discord, and creates an additional burden for all parties. We see no way in which administrative proceedings would resolve the *Edwardsen* problems.

5. LEGISLATIVE ABOLITION OF THIRD-PARTY CLAIMS FOR INDEMNIFICATION AGAINST THE STATE OF ALASKA AND THE FEDERAL GOVERNMENT

If this alternative were constitutionally permissible, it would reduce our workload but it would not solve our problem. The State believes that it has good defenses and would not be found liable in damages for great sums of money. We could be wrong, but we think not. The greater problem we face is not the threat to the State government's fiscal integrity but the threat to Alaska's social, economic, and political integrity. *Edwardsen* sets one race against another and strikes at the heart of our developing economy—the energy industry. Only a handful of oil companies are on the North Slope, but 150 private parties are to be named in the very first complaint. These parties are those individuals and companies which must be relied upon to develop the energy potential of the North.

Imagine the consequences in any state if the principal companies involved in the state's economic development and their contractors and subcontractors were made defendants in an action involving enormous and—to some of them—potentially ruinous damages. Imagine the reaction of lenders who finance the defendants' activities and of suppliers who furnish them goods and equipment on credit. Imagine the effect on the economy, on capital investment. Imagine the suit to be brought by a racial minority and to be based on claims for which they had—in the eyes of the general public—been generously awarded a large settlement in land and money. It is not difficult to imagine that some degree of hard feeling might be engendered, especially by anyone whose credit was called in or by anyone who became unemployed because his employer's credit was called in.

Imagine, in addition, that the United States, which started the whole thing, invokes immunity for itself and for the State and is itself the plaintiff against parties who are the subsequent grantees, lessees, and permittees of its grantee, the State. There are some who might question the equity of the arrangement.

At any event, the State must still defend as an alleged actual trespasser and as allegedly authorizing trespasses. And the United States authorized the State to commit those actions, expressly in the Statehood Act, authorizing conditional leases of tentatively approved lands—the very lands involved in the pending litigation.

We do not consider alternative 5 to be a solution to the *Edwardsen* problem. It was proposed by plaintiffs' counsel, and suggests a lack of appreciation of the very human problems created by *Edwardsen*.

6. A COMPLETE LEGISLATIVE SETTLEMENT OF THE NATIVE (TRESPASS) CLAIMS, SIMILAR IN NATURE TO THE ORIGINAL SETTLEMENT ACT

In 1971, the extinguishment of all Native claims was necessary. Congress could have extinguished them constitutionally without compensation. It chose to compensate. The State agreed and also agreed to contribute land and money to the settlement. The *Edwardsen* decision denies the State the benefit of that bargain. We believe that section 15 of S. 1824 restores that benefit without impairing in any way the original settlement. If Congress prefers a new Act to extinguish trespass claims based on aboriginal title, the same effect should obtain.

Accordingly, while preferring adoption of S. 1824, we would not oppose a new Act. We do not believe, however, that any additional compensation is required by equity or the constitution.

We are altogether disappointed that this matter is before you today. That it is, however, is the sorry fact with which we must deal. We believe that the adoption of section 15 of S. 1824 is the best resolution of the matter. We are fearful that a failure to take the action necessary to eliminate the basis for the pending legislation will have extremely adverse effects upon Alaska and all of its citizens. We did not and do not begrudge Alaska's Natives their claims. We think, however, that all those based on aboriginal title were extinguished and that Congress should so advise the courts.

Very sincerely yours,

GUY R. MARTIN, *Commissioner.*

STATE OF ALASKA,
JAY S. HAMMOND, GOVERNOR,
Juneau, Alaska, November 28, 1975.

Re Proposed Amendments to the Alaska Native Claims Settlement
Act *Pertaining to Edwardsen v. Morton.*

HON. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the State of Alaska, I wish to clarify the legislative record on a few points which may be of interest to the Committee. These points relate chiefly to matters raised for the first time in the memorandum by the Arctic Slope Native Association dated September 22, 1975.

First, I note that the Arctic Slope Natives continue to argue that Congress did not mean what it said in Section 4 of the Settlement Act when it stated that *all* claims based on aboriginal title were to be extinguished. This point is thoroughly covered in our earlier submissions (Hearings on Settlement Act, pt. 2, at 110, *et seq.*). I would observe here only that the Natives' argument on intent rests almost exclusively on their unfounded constitutional claim. That is, they argue that the legislative history of the Settlement Act does not show an intent by Congress to extinguish constitutionally protected claims, and that it follows that trespass claims based on aboriginal title were not meant to be extinguished. But this simply attributes to Congress the Natives' own erroneous and belated constitutional argument. The Alaska Federation of Natives and all other participants in the Settlement Act legislative process recognized that an effective settlement would have to include all claims based on aboriginal title, and no one argued at that time that there was any constitutional impediment to that approach. Thus the Settlement Act's legislative history supports not the distorted reading of that Act suggested by the Natives, but rather indicates the far fetched nature of their constitutional claim.

As for the constitutional argument itself, the Arctic Slope Natives' memorandum suffers from several apparent defects. First, it argues at length (pages 41 through 46) that unrecognized Native possessory rights are the legal equivalent of fee simple title, a contention that

the Supreme Court's Tee-Hit-Ton decision, 348 U.S. 272 (1954), conclusively refutes. Given the Tee-Hit-Ton holding that unrecognized aboriginal title is extinguishable without compensation and the additional holdings cited in our previous submission, Congress surely has control over derivative aboriginal claims. A taking is nothing more than a complete and total trespass. Just as the Settlement Act extinguished pre-1971 claims for takings of aboriginal lands (a point the Natives admit in their memorandum (page 33), and those on which there is no dispute), it also validly extinguished lesser interests based upon aboriginal title, including actions for pre-1971 trespass to aboriginal lands.

Second, through selective quotation from our early submissions, the memorandum attributes to the State a broad concession that any claim which can be pleaded as quasi-contractual in nature is constitutionally protected. That is not our position. The decided federal cases support the view that only where one party has relied upon the conduct of a second party—who by his conduct has assented to liability—is the second party bound; in that instance a constitutionally protected cause of action may arise from a contract that is implied under the circumstances. In the present case, however, the parties who entered upon Alaska lands were not assenting to any liability, and the Natives did not “rely” upon that allegedly trespassory conduct. Consequently, whatever technical pleading rules that Natives might invoke, the underlying circumstances are very different from those in the Supreme Court cases which Judge Gasch had improperly cited. The Natives’ claims have no genuine contractual aspect, and thus are not entitled to the benefit of special constitutional rules pertaining to contract claims.

Third, the Arctic Slope Natives’ memorandum places great stress on the assertion that causes of action based on aboriginal title are founded in common law. Without arguing the validity of this argument, we note here only that it is irrelevant. The critical fact is that causes of action to establish aboriginal title are wholly subject to the will of Congress. While some common law actions may not be subject to Congressional will, aboriginal title actions clearly are. Thus trespass actions based on aboriginal title would be treated like claims founded on a statute: they are extinguishable without compensation.

Finally, I wish to clarify the somewhat confused record which now exists regarding the statute of limitations applicable to the present and any future trespass actions brought by the United States on behalf of the Natives pursuant to the *Edwardsen* decision. First, 28 U.S.C. § 2415(b) establishes a six-year and ninety-day limitations period for such trespass actions where the cause of action accrued after July 18, 1966. Second, it provides that suit may be brought on a cause of action arising on or before July 18, 1966, at any time prior to July 18, 1977. Thus, until July 18, 1977, the United States is barred from asserting on behalf of the Natives only those trespass claims which arose after July 18, 1966, but more than six years and ninety days prior to the filing of a complaint. Claims which arose prior to that 1966 date—even those going back to 1867—may be asserted at any time up until July 1977. Thus the statute of limitations provides little protection from very extensive trespass litigation.

For the record, suit was brought in the Federal District Court for Alaska on October 7, 1975, by the United States, as trustee, in its own right and in behalf of the Eskimos inhabiting the Arctic Slope, against the State of Alaska and 122 other defendants. As we predicted, the suit is not against a small number of major oil companies.

Respectfully submitted,

GUY R. MARTIN, *Commissioner*.

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., September 22, 1975.

To: Senate Committee on Interior and Insular Affairs

Attention: Senator Jackson.

From: American Law Division.

Subject: Alaska Native Claims and *Edwardsen v. Morton*: Proposed Legislative Solutions.

This is in response to your request for comments and reactions to several alternative solutions to the problems posed by the decision in *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973) as outlined in your letter of September 12.

The court in *Edwardsen* held, *inter alia*, that third-party trespass claims against aboriginal lands in Alaska survived the Alaska Native Claims Settlement Act. A bill, S. 1824, has since been introduced, section 15 of which would clarify Congressional intent relative to the extinguishment of such claims and amend the Settlement Act to make clear that trespass claims were intended to be embraced within the extinguishment accomplished by the Act.

Inquiries were directed to various parties, including this Division, with respect to various aspects of the *Edwardsen* situation and the desirability of a legislative solution. The responses have been printed as Part Two of the hearing record. Many of the responses suggested alternatives to S. 1824 and it is these alternatives which are discussed below.

1. NO ACTION WHATSOEVER BY CONGRESS

The decision in *Edwardsen* regarding the trespass claims was not a final judgment appealable by the Government. The court denied the Government's motion for summary judgment, which was based on the contention that the Settlement Act extinguished the trespass claims sought to be pursued by the plaintiffs in *Edwardsen*. Thereafter, a stipulation was entered into between the parties whereby the Department of Interior agreed to recommend to the Justice Department the institution of litigation for damages for third-party trespasses where such trespasses could be documented after investigation. A litigation report was to be forwarded to the Justice Department sometime in August. See, Hearings Before Senate Committee on Interior and Insular Affairs on Sundry Bills Relating to Alaska Native Claims Settlement Act, 94th Cong., 1st Sess., Part Two 190 (1975) (hereinafter, Hearings).

Whether a final judgment in *Edwardsen* will be entered from which an appeal raising the trespass issue can be taken is not clear nor is a time frame determinable. It would seem, however, that defendants

in any trespass actions could raise the issue of the effect of the Settlement Act on the plaintiffs' right to pursue their cause of action. A decision contrary to *Edwardsen*, or at least appellate review of the specific legal issue, is thus possible. An argument can be made, therefore, that an attempt at a legislative solution to the problem is premature in light of the status of adjudication of the issue.

While the possibility of reversal of the *Edwardsen* result remains (thus, making legislative action unnecessary), it can also be argued that, since the litigation spawned by *Edwardsen* will not have a significant effect on the overall implementation of the Settlement Act, legislative action is not needed. The Department of Interior and the Alaska Federation of Natives see no significant effect on the Settlement Act. Hearings 191, 195. In fact, since *Edwardsen*, apparently no other native group has filed suit (194) and the Interior Department contemplates no more than "several dozen" cases to be recommended to the Justice Department for litigation. Hearings 190. On the other hand, the State of Alaska and others point to diversion of resources and social disruption as consequences of *Edwardsen* suits. An assessment of the potential consequences of litigation is difficult both because of the sharply divergent views of the parties involved and the lack of information on the Department of Interior's recommendations and the intentions of the Justice Department. Thus, legislative action may be thought premature not only because of the interlocutory status of adjudication but also because of the lack of information on which to base a decision as to the actual necessity of legislation.

Passage of S. 1824 may also be viewed as an unwarranted interference by the legislative branch into the operations of the judiciary. It is argued that the cases should be allowed to run their course with the possibility that judicial resolution may make legislative action unnecessary. It is not inconceivable that the decision in *Edwardsen* will not be upheld or followed by other courts; strong arguments against the court's reasoning have been presented in the materials submitted to the committee. Regardless of the outcome, however, Congress cannot respond with legislation to every decision of a court, particularly a decision subject to further judicial review. Thus, it can be argued, that S. 1824 is a hasty and unwarranted invasion of judicial prerogatives.

Legislation designed to thwart *Edwardsen* suits may also spawn its own litigation. Charges of unconstitutional takings of property are sure to be raised by those pressing trespass claims. Another layer of litigation may thus be introduced into an already complex legal situation.

Finality and the resolution of problems attendant the native claims issue in Alaska are the motivations behind a legislative solution such as S. 1824. The question is whether finality will be achieved by legislation and at what cost, or whether allowing the forces set in motion by *Edwardsen* to run their course will ultimately result in a more satisfactory resolution of the problem.

2. RETROACTIVE EXPRESSION OF CONGRESSIONAL INTENT IN APPROPRIATE LEGISLATIVE FORM

This approach would apparently involve clarifying amendments to the Settlement Act to include trespass claims among those extinguished by the Act or some statement, adopted by the Congress, enunciating

the intent of the Congress in the Settlement Act. While subsequent legislation is not conclusive as to the intent of a past Congress, it is given weight by courts. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Glidden Company v. Zdanok*, 370 U.S. 530, 541 (1962). "Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion." 370 U.S. 530, 541.

While more weight would be given to subsequent expressions of the Congress as a whole in the form of clarifying amendments or statutes, the Court has looked for guidance at Congressional expressions of past intent which were not in the form of amending legislation. In *New York Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973), the question was whether Federal Work Incentive Program provisions of the Social Security Act pre-empted New York public assistance Work Rules. A district court had invalidated the state rules on the ground of federal pre-emption. The Supreme Court reversed, finding no legislative intent that state laws were to be pre-empted by the federal provisions. In support of its conclusion, the Court pointed to a colloquy on the floor of the Senate which occurred after the district court's decision in which the Chairman of the committee which considered the federal law stated, in response to a question, that it was not his intent to supercede state laws. 413 U.S. 405, 416 n. 19.

Thus, the dialogue which has already ensued regarding the intent of the Settlement Act may be viewed by a court considering the *Edwardsen* decision as guidance for its reading of the legislative history. Actual amendatory legislation would be more persuasive, however, in that legislation expresses the will of the Congress as a whole. Clarifying legislation and/or the debate that has ensued would also seem to be more persuasive in this context given the relatively short time span between passage of the Settlement Act and the clarifying language and the participation of many of those involved in the drafting and passage of the original act.

3. CONGRESSIONAL ACTION TO ESTABLISH A PROCEDURE FOR, AND TO MANDATE EXPEDITED JUDICIAL REVIEW OF, THE OPINION OF THE COURT IN THE EDWARDSSEN CASE

Providing for expedited review of questions arising under particular legislation is not unprecedented. For instance, the Federal Elections Campaign Act Amendments of 1974 contain provisions for certification of constitutional questions to the Court of Appeals, direct appeal to the Supreme Court within 20 days of the appellate court's decision, and a directive to both courts that they "expedite to the greatest possible extent the disposition of the matter" certified under the Act. 2 U.S.C. 437 h. An expedited review provision could relate to review of any ultimate final judgment which may emerge from the *Edwardsen* court, expeditious filing and review of trespass litigation pursuant to the *Edwardsen* stipulation, or, review of amending legislation such as S. 1824.

Time limits might also be imposed on the filing of third-party trespass suits by other Native groups. As stated above, the government's filings could also be expedited. Such procedures would be an effort to channel suits in order to resolve the underlying questions as soon as possible. Such Congressional action would not be as intrusive

as substantive amendatory legislation designed to overturn the *Edwardsen* decision.

Formulating an expedited review scheme for the *Edwardsen* decision itself would be more difficult than when Congress provides for expedited review procedures of questions not yet subjudice. The posture of the *Edwardsen* case is also peculiar. The denial of the government's motion for summary judgment was not a final judgment, it merely meant that trial was to proceed. The Department of Interior then entered into a stipulation whereby they agreed to investigate trespass claims and recommend appropriate litigation by the Department of Justice. As these suits, if any, proceed, the third-party defendants will presumably raise the issue of extinguishment as a complete defense. Thus, other courts may decide the issue and their decisions may be appealable prior to any final resolution of the original *Edwardsen* suit.

The foregoing scenario is based on sketchy information regarding the current status of the case. Before any legislation is formulated, information as to the current posture of the case and the intentions of the parties must be obtained.

4. CREATION OF AN ADMINISTRATIVE ENTITY, SIMILAR TO THE PUEBLO INDIAN LANDS BOARD, TO RESOLVE THE NATIVE CLAIMS INVOLVED

The purpose behind creation of an administrative entity would be to focus the various trespass claims with a view towards expeditious resolution by a single body. Such a body, presumably manned by persons expert in the history of the region and the law involved, could investigate claims and either settle them through compensation or recommend litigation. The exact make-up of such a body, its functions and powers, can be better determined when the scope of the problem is more clearly defined.

It could be argued, however, that establishment of a separate administrative body to consider the claims involved would only complicate the ultimate resolution of the problem by adding a bureaucratic layer. Witness the backlog at the Indian Claims Commission. Furthermore, additional complications arise because the claims issue is already in the courts and the Justice Department is apparently examining the feasibility of further litigation. Creating a body to handle the claims is also, in effect, conceding the validity of such causes of action. Further judicial consideration of the trespass claims issue may result in a holding that such claims were extinguished by the Settlement Act, thus mooted the need for a procedure to handle the claims.

Trespass claims, unlike solely title claims, may be more appropriately handled in a judicial adversary procedure. Establishing title entails more of an historical investigation, although questions of adverse possession raise complications. Trespass, on the other hand, may involve more conflicting versions of events and considerations of motivation and authorization may enter into the picture. Such claims might be more appropriately handled by a judicial tribunal rather than an administrative entity.

5. LEGISLATIVE ABOLITION OF THIRD-PARTY CLAIMS FOR INDEMNIFICATION AGAINST THE STATE OF ALASKA AND THE FEDERAL GOVERNMENT

A "right of indemnity has been said to exist whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." 41 Am. Jur. 2d Indemnity, § 2. As pointed out by Prosser, "[t]here is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead." Prosser, Torts 278 (3rd ed. 1964). "[W]here one is directed or employed by another to do an act not manifestly wrong . . . he is uniformly entitled to indemnity when a third party recovers against him." Id., 279-80. Apparently, it is these types of suits to which this proposal is directed.

Indemnity in the above context springs from equitable principles. The abolition of rights to indemnity, constitutional questions of compensation aside, would thus seem to undermine the equity which is sought to be achieved. Sparing the principal wrongdoer from shouldering the loss (the principal wrongdoer being the putative indemnitor) would seem to run counter to the equitable considerations underlying both indemnity and contribution in the law of torts.

The abolition of such suits (or limits on joinder) would relieve the potential governmental defendants from the indirect liability which would be sought by various third-party indemnities. Any direct liability of the State or Federal Government would presumably remain. However, as noted by attorneys for the *Edwardsen* plaintiffs, "if the State's concern about its indirect liability is correct, . . . its indirect liability exposure would dwarf its direct liability." Hearings 12. To the extent, therefore, that monetary expenditure and diversion of resources significantly affects the implementation of the Settlement Act, the abolition of a major potential governmental liability may serve to allay fears of the impact of *Edwardsen* on the overall claims picture. However, questions of fairness would seem to loom large in any such legislative action.

6. A COMPLETE LEGISLATIVE SETTLEMENT OF THE NATIVE CLAIMS, SIMILAR IN NATURE TO THE ORIGINAL SETTLEMENT ACT

The Settlement Act was intended—and still may be interpreted as—"a complete legislative settlement of the Native claims." S. 1824, if enacted, would make it clear that such a complete settlement was and is intended. Therefore, the nature and scope of this final proposal is not entirely clear.

Since the Settlement Act is in the process of being implemented and complicated machinery for the resolution of the claims is already in place, a substitute legislative approach would not seem desirable.

Furthermore, new comprehensive legislation is bound to spawn litigation, just as the Settlement Act itself has, thus defeating one of the purposes for a different legislative approach. Legislation similar in scope to the Settlement Act would also undoubtedly take years to formulate and pass the Congress.

CONCLUSION

The foregoing have been comments and reactions to several alternatives to S. 1824 and the problems raised by *Edwardsen v. Morton*. An attempt has been made to offer both pro and con analysis of the proposals where possible. However, the potential problems attendant some proposals necessarily dominate the discussion.

The *Edwardsen* situation is still fluid, with the scope of further litigation not yet clear. While such a situation makes analysis difficult, it also might indicate that legislative involvement is premature. Thus, the first proposal—no action by Congress—may be the most appropriate at this time. Of the legislative alternatives suggested, however, the ones which pose the least problems in terms of coordinate governmental intrusion, complexity and likelihood of passage would seem to be retroactive expression of Congressional intent and provision for expedited judicial review in *Edwardsen* suits. Creation of a claims-settling administrative entity and an overall legislative settlement may only complicate the situation, engender further litigation and set back ultimate resolution of the native claims. Legislative abolition of third-party indemnity claims against the government, while simple conceptually, may raise questions of fairness and prematurity, particularly since the scope of further litigation is not yet clear.

RICHARD EHLKE,
Legislative Attorney.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., December 5, 1975.

HON. HENRY JACKSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR JACKSON: This letter is in amplification of the Department's testimony before your Committee on September 24 and in response to your letter of September 12 requesting our views on six categories of alternative solutions to the issues raised by *Edwardsen v. Morton*. In our previous letters, we have commented in a very general way on the first two categories in your letter namely, no action by Congress and retroactive expression of Congressional intent. This letter sets out our specific comments on those two as well as the other four categories.

Categories 1 and 2

The Administration has just recently determined to support enactment of section 15 of S. 1824. In view of the Administration, that section accurately reflects the original intent of Congress when it passed the Alaska Native Claims Settlement Act; the Administration therefore supports this legislation to make unmistakably clear Congress' original intent. For the same reason, the Administration does not support category one, no action by Congress.

Category 3

The third alternative, establishment of a procedure for a mandatory expedited judicial review of *Edwardsen*, is undesirable for several reasons. First, as we noted in earlier letters, no appealable order has yet been entered in that case. Normally, judicial opinions are reviewed by an appellate court only as an adjunct to a review of a specific court order. Consequently, there is no order in existence which an appellate court could review; any legislation to mandate such a review, therefore, would also require a fundamental change in normal judicial procedures. Direct appellate review of the *Edwardsen* case is also complicated by the stipulation this Department entered into in August 1974. Under the stipulation, we agreed to recommend trespass litigation to the Department of Justice, which we have recently done.

If the *Edwardsen* decision were to be appealed, Interior would of necessity have to repudiate that stipulation and to advocate positions before the Court of Appeals that would conflict with the litigation we have recommended.

An alternative, but similar, approach might achieve some of the objectives of expediting court review, if the Congress believes that goal to be desirable. We expect that the defendants in the trespass litigation that will be commenced pursuant to our recommendation will resist liability on grounds that Section 4c of ANCSA terminated the trespass claims. Congress might enact legislation providing for an expedited review of the trial court's ruling on that defense in that litigation.

Category 4

We do not believe creation of an administrative body to resolve the Native trespass claims would facilitate their resolution. First, the trespass claims that will be litigated are the type of claims that courts traditionally handle. Second, the same legal and factual issues would be presented to an administrative entity as would be presented to a court. Thus, we do not believe departing from the usual practice of litigation in court would expedite resolution of the claims.

Category 5

Legislative abolition of any indemnification claims that might exist is a different proposition from legislative extinguishment of Native land claims, for it would present Constitutional taking questions; the United States might be liable for the abolition of these claims. Moreover, the potential liability, if any, of the United States might actually be increased, because of a Congressional taking of any claims against the State.

Category 6

Congressional enactment of a legislative settlement could go beyond the matter of section 4 of ANCSA and encompass subjects such as tort law and amount of damages. As mentioned previously, courts are better equipped than Congress to deal with such questions of law and fact. Further, the United States—rather than the private defendants—might thereby be assuming liability on all such claims.

Sincerely,

ROYSTON C. HUGHES,
Assistant Secretary of the Interior.

DEPARTMENT OF JUSTICE,
Washington, D.C., September 24, 1975.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of September 12, 1975, to the Attorney General, in which you ask for the views of the Department of Justice on Senator Steven's Amendment to S. 1824, as well as on several alternative approaches to the issues raised by the decision of the Court in *Edwardsen v. Morton*.

Very briefly, it is the view of this Department that the decision in the *Edwardsen* case is incorrect, to the extent that it holds that claims for trespasses to lands used and occupied by Alaskan Natives survive the settlement intended to be effected by the Alaska Native Claims Settlement Act. Obviously, the first and second alternatives referred to in your letter of September 12, 1975, are consistent with the Department's position; the third alternative, which would merely permit expedited judicial review of that decision, is a course of action available under existing law. The fourth, fifth and sixth alternative courses of action, proceeding, as they do, on the premise that the *Edwardsen* decision with respect to trespass claims is correct, are inconsistent with the position that we have taken in the *Edwardsen* case. We are enclosing herewith a copy of the statement which will be made by Acting Assistant Attorney General Walter Kiechel, Jr., at the hearing you have invited us to attend on September 24; this statement expresses our views on the six alternatives.

Our letters to you of August 27 and June 3 also contain material relating to the position of the Department of Justice in the *Edwardsen* litigation, and may be of assistance to you and your Committee.

Sincerely,

MICHAEL M. UHLMANN,
Assistant Attorney General.

ALASKA FEDERATION OF NATIVES, INC.,
Anchorage, Alaska, September 22, 1975.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am replying to your letter of September 12, 1975, regarding legislation to extinguish the *Edwardsen* litigation. In our view the six alternatives you suggest have the following advantages and disadvantages:

1. *Do nothing at this time.*—It is apparent that the committee does not at this time have an adequate factual basis on which to legislate. The State of Alaska predicts dire consequences to the State and its economic and social structure unless the *Edwardsen* case is extinguished. The *Edwardsen* plaintiffs contend that the actual trespass litigation will primarily involve suits against certain entities, predominantly oil companies, and that the State and individual Alaskans will not be affected to the extent claimed by Senator Stevens and Mr. Martin. AFN is informed that the trespass suits will shortly be filed. When those suits are filed we will know who the actual defendants are,

and we may be able better to assess their potential liability. AFN does not believe that any legislation in this area is needed if the dire consequences foreseen by some are not genuine. Thus it seems prudent to us to delay any committee action until after the trespass suits are filed. We will then have a more accurate factual basis on which to act. Legislative action before that time would be based on pure speculation.

The only disadvantage we see from not acting at this time is the remote possibility that the mere filing of lawsuits would trigger the disaster forecast by proponents of § 15 of S. 1824. AFN does not believe that the simple filing of suits would bring about any serious consequences in the social structure of Alaska, absent unjustifiable exploitation of those filings by public figures. The real threat—if any—is from the prosecution of the suits, not from the simple act of filing a complaint.

The delay suggested need not be unlimited. As the State notes in its legal memoranda, the statute of limitations on trespass claims in Alaska will run out in 1977. Well before then the suits to be prosecuted on behalf of the Arctic Slope Eskimos will be filed. The committee thus will know by late 1977 whether or not other such suits will be instituted in other areas of Alaska. It does not seem unreasonable to withhold action until that time, given the possible consequences of attempting a legislative solution of the *Edwardsen* litigation.

2. *A re-affirmation of congressional intent.*—According to the State's submission, this alternative, in and of itself, should be enough to dispose of the alleged "problem." This approach has the decided advantage of avoiding an actual amendment to the Settlement Act since the re-affirmation could take the form of floor colloquies or resolutions. Moreover, this approach leaves the issue in the judicial branch without a direct congressional attempt to overrule Judge Gasch.

However, this approach has the disadvantage of all retroactive expressions of legislative intent. No matter what Congress does in 1975, it cannot amend the legislative history written in 1971 and before. That record is now closed. The present members of the Interior Committee differ significantly from those who sat when the Settlement Act was passed, and it is thus somewhat difficult for the present committee to say what the former committee meant. Finally, there is a tendency in this approach to make a new legislative record under the professed desire merely to "clarify" the old one. In truth such efforts may well be attempts to say what Congress now feels about a problem it did not consider then. AFN suggests that the extinguishment of third-party trespass causes of action is just such an area. We believe Congress did not specifically focus on this subject before this year and that a genuine "re-affirmation" of legislation intent is thus impossible.

3. *Expedited appellate review.*—In my letter of July 2, 1975, AFN suggested that legislation to expedite an appeal of Judge Gasch's decision might be desirable, although we noted that an appeal could be taken without additional legislation. In its undated letter of reply to yours of August 5, 1975, the Department of Justice states that the April, 1975, order of Judge Gasch is not appealable. AFN is advised that while that position is technically correct, it overlooks the possibility of an interlocutory appeal under 28 U.S.C. § 1292(b).

That section, we understand, permits an appeal from an otherwise non-appealable order if the district court certifies that the order involves a controlling question of law as to which there are substantial grounds for differing opinions and that an interlocutory appeal would facilitate a final determination. As far as we know, none of the parties in the *Edwardsen* litigation have sought such a certification.

AFN is also advised that the *Edwardsen* decision could be taken directly to the Supreme Court without review by the Court of Appeals, though such a course appears unlikely. This review would require an interlocutory appeal under 28 U.S.C. § 1292(b) and a petition to the Supreme Court for certiorari before judgment in the Court of Appeals under 28 U.S.C. § 1254(i).

Although appellate review of Judge Gasch's April, 1973, order is possible under existing statutes, congressional action creating specific appellate review of that order and, perhaps, mandating such review, could insure that an appeal which is otherwise discretionary in several respects would instead become a virtual certainty.

If Congress were to mandate an appeal in *Edwardsen*, fairness dictates that the statute of limitations otherwise applicable to the trespass suits should be extended pending that appeal, or that the trespass suits could be filed, but not prosecuted, during the appeal.

4. *Special Administrative Board.*—The Congressional Research Service suggested in its June 11, 1975, letter that Congress consider establishing an administrative board to deal with the *Edwardsen* issue. This board could, CRS suggested, be modeled after the Pueblo Land Board created to decide questions of title to certain Indian lands. Such a board does not appear necessary or wise. The trespass suits, as well as the *Edwardsen* litigation itself, raise no issues that are not subject to decision in the normal judicial process. It does not appear that any special administrative expertise is needed for the decision of these cases. An administrative board could admittedly handle these cases exclusively and perhaps more expeditiously, but those factors alone might not warrant creation of a new Federal agency.

5. *Extinguishment of the trespassers' indemnity claims.*—The *Edwardsen* plaintiffs suggest that Congress extinguish the trespassers' claims for indemnification rather than their own claims against the trespassers. Such a solution would, we submit, solve the problems raised by Senator Stevens and Mr. Martin. However, these indemnity claims, if any, are the same type of property as the trespass claims of the Eskimos. Extinguishment of the indemnity claims would, we believe, violate the Fifth Amendment as to any valid claims. This solution might subject the United States to damage suits by the trespassers in the Court of Claims. This alternative does eliminate the possibility that the Settlement Act could be invalidated were Congress to amend it to extinguish the trespass claims of the Natives. Thus while problems of a constitutional scope are involved, at least those problems—unlike Section 15 of S. 1854—do not threaten the Settlement Act itself.

6. *A separate settlement of the Arctic Slope claims.*—This alternative would work *if* the amount provided to the Eskimos was sufficient under Fifth Amendment standards. In 1971 Congress extinguished

title to our lands and we agreed that that title was not subject to Fifth Amendment valuation. Alaska Natives knew we got less than full value for our lands, but we were making a political settlement, not a deal subject to judicial review under the Fifth Amendment. In this regard we note that if the Arctic Slope had been dealt with in 1971 in a way they deemed more fair to them, the present dispute might not have continued.

This alternative would be fair to all if the compensation is adequate. It would eliminate the Slope's litigation if the Arctic Slope were satisfied with the amounts awarded, or at least transfer litigation away from prosecution of the trespass suits if they were not satisfied. This alternative affirms the dignity of aboriginal title and protects the State's interest in seeing a rapid solution of the threat it perceives.

This letter sets forth our thoughts on the advantages and disadvantages of the six suggested alternatives. The full AFN Board is scheduled to meet in Washington, D.C., this week and we will consider the *Edwardsen* issue at that meeting.

Sincerely,

SAM KITO, *President.*

COVINGTON & BURLING,
Washington, D.C., September 22, 1975.

HON. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This firm, which has been acting as counsel to Atlantic Richfield Company, BP Alaska Inc., Exxon Corporation, and The Standard Oil Company (Ohio) in regard to certain matters relating to their Alaska operations, has been requested to respond on their behalf to the letter from you, dated September 11, 1975, seeking comment on legislative alternatives to Section 15 of S. 1824. That section is intended to respond to the interpretation of Section 4 of the Alaska Native Claims Settlement Act made by the district court in *Edwardsen v. Morton*.

Our analysis of the six alternatives on which the Committee has requested specific comment is attached to this letter.

We thank the Committee for its consideration of this matter. The companies are in full agreement with the State of Alaska, the Department of the Interior, and the Department of Justice that the Settlement Act extinguished all claims, including trespass claims, based on aboriginal title. While the companies are confident that this position will ultimately prevail if litigation is necessary, they support legislation which, like Section 15 of S. 1824, would resolve the problems created by the *Edwardsen* decision's misinterpretation of the Settlement Act. Such legislative action would accomplish a principal purpose of the Settlement Act—the avoidance of lengthy and socially disruptive litigation of claims based on aboriginal title.

Yours sincerely,

BRICE M. CLAGETT.

Attachment.

SEPTEMBER 22, 1975.

RESPONSES OF ATLANTIC RICHFIELD COMPANY, BP ALASKA INC., EXXON CORPORATION, AND THE STANDARD OIL COMPANY (OHIO) ON LEGISLATIVE ALTERNATIVES TO SECTION 15 OF S. 1824

This memorandum is submitted on behalf of the above four companies in response to the request of Senator Henry M. Jackson, Chairman of the Committee on Interior and Insular Affairs, dated September 11, 1975, for their views on possible legislative alternatives to Section 15 of S. 1824. Our comments follow the format of Chairman Jackson's letter.

1. NO ACTION BY CONGRESS

The determinative question for the Committee is whether legislative action should be taken to avoid the lengthy, complex, and divisive litigation which will ensue if there is no legislative action responsive to the decision of the district court in *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973). As explained by the Departments of Justice and the Interior, hundreds of trespass claims against numerous defendants relating to the North Slope area alone will be filed as a result of that decision. Counsel for the *Edwardsen* plaintiffs have made clear their view that these claims should seek damages of hundreds of millions of dollars.

We believe that the district court in *Edwardsen* was wrong in holding that trespass claims based on aboriginal title were not extinguished by the Alaska Native Claims Settlement Act. We are thus confident that the trial courts hearing the trespass actions will, after full consideration of the question, conclude that actions based on aboriginal title are barred. But during the time in which the first such decision could be obtained, hundreds of claims will be filed and many others prepared. And during the appeal of the initial district court rulings, as a protective measure additional claims will be filed with even further expense incurred. Particularly in light of statute-of-limitations considerations, Native groups and/or the United States on their behalf may be obliged to pursue hundreds of claims. Each suit would be further complicated by a multiplicity of parties and protective cross-claims, counterclaims, and indemnity claims.

In the event that the view of the *Edwardsen* plaintiffs on the intent of the 1971 Settlement Act were to prevail, the ensuing litigation would be extraordinarily complex and protracted. Litigation of the question of whether aboriginal title existed to particular areas of the North Slope—a necessary predicate to the trespass claims—would take many years and, given the unusual factual and legal issues involved, probably several rounds of appeals would be necessary. We would estimate that the litigation of each major case would thus take more than a decade. The *Tlingit & Haida* case, which in many respects was simpler in nature and involved a smaller land area than will the Arctic Slope suits, took more than thirty years to litigate. The desire to avoid just such interminable litigation as occurred in *Tlingit & Haida* was a principal purpose of the Settlement Act.

There is, moreover, every expectation that the suits will be statewide in scope; certainly the *Edwardsen* holding is applicable to the 90%

of Alaska that had been claimed up to 1971 under the doctrine of aboriginal title, and the Department of the Interior has reported already receiving indications of interest in trespass suits by two Regional Corporations outside the North Slope area.

To allow litigation emanating from the *Edwardsen* decision to be brought would be contrary to the 1971 Settlement Act and its legislative history. One principal purpose of that Act was to settle all Native aboriginal claims so that they would not be litigated. Failure to resolve through legislative action the problem created by the *Edwardsen* decision would lead to suits which would be among the most complex and lengthy ever brought.

We wish to respond briefly to one point made at this Committee's May 16, 1975 hearing on S. 1824. At that time statements were made to the effect that certain oil companies knowingly trespassed on Native lands on the North Slope as part of a "calculated risk" to secure economic advantages vis-a-vis other companies. It should be noted that more than 90% of Alaska was, at the time of the Settlement Act, claimed under the doctrine of aboriginal title. The validity of these claims has of course never been established. Thus, the accusation that everyone who entered Native-claimed land in Alaska was taking a "calculated risk" is one that could just as easily be leveled equally against virtually every non-Native citizen of the State.

Further, it should be remembered that a large area of the North Slope between the Colville and Canning Rivers was selected by the State of Alaska in 1964 under the Statehood Act, and that the Secretary of the Interior, without opposition, approved those selections in the same year as "vacant, unappropriated, unreserved." The participants in the oil exploration thus had every reason to think (and still have every reason to think) that their activities were fully authorized by duly empowered officials of the State and Federal governments.

2. EXPRESSION AS TO THE INTENT OF THE 1971 ACT

Legislation by Congress stating that the 1971 legislation was intended to extinguish all claims based on aboriginal title, including claims of trespass, would be a positive response to the *Edwardsen* court's erroneous interpretation of the Settlement Act. Although we prefer the more comprehensive approach of Section 15 of S. 1824, we believe alternative two would be a helpful legislative action for several reasons.

The district court's misinterpretation of a single passage in this Committee's 1971 report¹ is the principal reason that the subject of Alaska Native aboriginal claims—thought to have been settled once—is now back before the Congress. See 369 F. Supp. at 1379. We would urge the Committee to correct the court's misreading of its action.

Second, we agree with the State of Alaska and the United States Departments of Justice and the Interior that the *Edwardsen* decision is contrary to the plain meaning of the Settlement Act and its legislative history. There are numerous references throughout the legislative history of the 1971 Act to trespass claims, and Congress clearly

¹ S. Rep. No. 92-405, 92d Cong., 1st Sess., p. 110.

intended the Act to be broadly construed to extinguish all aboriginal claims.² There is absolutely no indication in the legislative history that Congress intended to preserve hundreds of aboriginal claims supposedly worth hundreds of millions of dollars; to the contrary, every indication is that they were to be extinguished.

Finally, there is substantial precedent for Congressional clarifications of prior legislative intent. Congress frequently has passed legislation for the purpose of clarifying or reaffirming the meaning of earlier legislation. It is well established that the United States Supreme Court and other Federal courts will give great weight to these subsequent enactments in construing the original act. (Hearings, pt. 2, at 163-67.)

3. EXPEDITED REVIEW OF THE "EDWARDSSEN CASE"

Expedited review of the *Edwardsen* decision is an inappropriate response to the problem at hand. The State and private persons threatened by trespass litigation are not parties to that suit. They have had no part in defining or arguing the issues or in creating the record. Moreover, the case involves primarily issues of federal trust responsibility. It does not involve the adjudication of any claims against the State or private persons, and its expedited review might neither preclude nor resolve trespass litigation against them.

More importantly, an appropriate legislative response to *Edwardsen* would necessarily include a clarification by Congress of the Settlement Act's intent. This is a matter uniquely within the competence of Congress, and one which can be easily resolved by it on an immediate basis. The Settlement Act was intended to eliminate litigation of aboriginal claims, and a legislative response which contemplates further litigation debating Congress' intent—however expedited—undercuts a basic goal of the 1971 Act.

4. CREATION OF AN ADMINISTRATIVE ENTITY TO RESOLVE THE NATIVE CLAIMS

A suggestion was raised by the Library of Congress that an administrative tribunal, similar to the Pueblo Lands Board (*see* Act of June 7, 1924, ch. 331, 43 Stat. 636), might be established to resolve the trespass claims. (Hearings, pt. 2, at 179.) This proposal would be merely procedural, with an administrative body—rather than a court—charged with adjudicating the claims.

It is difficult to see how this tribunal could lessen the problems presented by the trespass claims. Absent a concurrent effort by Congress to clarify the scope of the Settlement Act's extinguishment provisions, the aboriginal trespass claims would still have to be fully litigated, and the burdens of this litigation upon the parties—the State and Federal governments, private parties, and the Natives—would not be alleviated. Indeed, as indicated by the Library of Congress itself in raising this alternative, a special tribunal "may only serve to extend ultimate resolution of the Alaska native claims problem." (Hearings, pt. 2, at 179.) This is because constitutional guarantees might well entitle all trespass defendants to *de novo* judicial proceedings in addition to

² Hearings Before the Senate Committee on Interior and Insular Affairs on Amendments to Alaska Native Claims Settlement Act, 94th Cong., 1st Sess., pt. 2, at 117-48 (1975) (hereinafter "Hearings, pt. 2").

whatever administrative proceedings are authorized. Particularly because trespass is a traditional common law action, the Seventh Amendment right to jury trial would seem clearly applicable. It is significant that the Pueblo Lands Board was not empowered to assess damages against third parties, and title claims of third parties could be determined only through a *judicial* action brought by the Attorney General. § 3. Even damage awards out of the U.S. Treasury were subject to essentially *de novo* judicial review. § 6; see *Pueblo de San Juan v. United States*, 47 F. 2d 446 (10th Cir.), *cert. denied*, 284 U.S. 626 (1931). Thus rather than serving as a substitute for judicial proceedings, the proposed administrative tribunal would merely represent an additional layer through which the trespass litigation would have to pass.

5. LEGISLATIVE ABOLITION OF THIRD-PARTY CLAIMS FOR INDEMNIFICATION AGAINST THE STATE OF ALASKA AND THE FEDERAL GOVERNMENT

Counsel for the *Edwardsen* plaintiffs has suggested that Congress extinguish the indemnity claims which various private parties have against the State of Alaska and the Federal Government for alleged trespasses on the Arctic Slope. (See Hearings, pt. 2, at 12.) This extinguishment would unquestionably require the payment of just compensation to the affected private parties. Unlike the Native trespass claims, based as they are on aboriginal title which Congress can extinguish, the indemnity claims are vested property rights which are protected by the Fifth Amendment to the Constitution.

In any event, the proposal as formulated by the *Edwardsen* Plaintiffs would resolve very little of the concern raised by the *Edwardsen* decision. It would not include extinguishment of either the State's or the Federal Government's liability to the Natives for the governments' own direct trespasses. Nor would it cover Federal and State liability to the Natives for inducing or sanctioning trespasses by third parties. See *Edwardsen v. Morton*, 369 F. Supp. at 1371. Further, this alternative would not affect any Federal liability to Natives arising from trespass claims against third parties which the Government, as trustee for the Natives, failed to bring. And, finally, the proposal would provide no benefit to the hundreds of private parties likely to be burdened with the trespass suits.

6. NEW LEGISLATIVE SETTLEMENT

No new legislative settlement of aboriginal trespass claims involving new compensation is necessary. The 1971 Act was itself a comprehensive settlement with a payment of 40 million acres and almost \$1 billion. But Congress would—by a new extinguishment provision drafted with unmistakable clarity—reaffirm its intent to terminate all claims based on aboriginal title. This would settle the question whether trespass claims derived from the *Edwardsen* decision should be pursued. And especially given the various other amendments to the 1971 Act now being considered by this Congress, inclusion of a new extinguishment provision would provide a fair and balanced legislative response to the pending problems of the Settlement Act's implementation.

It is clear that the Constitution presents no impediment to a new extinguishment by Congress. Congress has plenary power with respect to aboriginal title claims, and this power is not impeded because an aboriginal claim is recast as a trespass claim. The argument that aboriginal trespass claims are constitutionally protected property finds no support in the relevant case law. Supreme Court decisions make clear that aboriginal title which has not received Congressional recognition can be extinguished without compensation. If no constitutional question is raised by the uncompensated taking of aboriginal title, a Congressional extinguishment of a trespass claim based on aboriginal title clearly does not raise a constitutional question. The constitutionality of the Settlement Act's extinguishment of claims based on prior takings of aboriginal title land has never been questioned. Since a taking is basically a complete and total trespass, the argument that trespass claims to aboriginal lands are not extinguishable is plainly untenable. (*See* Hearings, pt. 2, at 65-013.)



